89-250

No.

FILED

AUG 14 1989

JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

BLUE CROSS AND BLUE SHIELD
OF MARYLAND, INC.,

Petitioner,

v.

ROBERT WEINER, SR., MARGARET WEINER, MARK WEINER,
AND ROBERT WEINER, SR. AS PERSONAL REPRESENTATIVE
OF THE ESTATE OF STEVEN WEINER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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August 14, 1989

The Daily Record Co., Baltimore, MD 21202

QUESTION PRESENTED FOR REVIEW

Did the United States Court of Appeals for the Eleventh Circuit err in failing to enforce the unique and extraordinary preemptive power of ERISA, as announced by Congress and this Court, by allowing a Florida state court to proceed with a case covered by ERISA over which it had no subject matter jurisdiction?

LIST OF PARTIES

Pursuant to Rules 21.1(b) and 28.1, Petitioner states that the following parties appeared in the United States Court of Appeals for the Eleventh Circuit:

a) Blue Cross and Blue Shield of Maryland, Inc.;[1]
b) Blue Cross and Blue Shield of Florida, Inc.;
c) Robert Weiner, Sr.;
d) Mark Weiner;
e) Margaret Weiner; and
f) Robert Weiner, Sr., as Personal Representative of the Estate of Steven Weiner.

[1]Pursuant to Rule 28.1, the corporate affiliates of Blue Cross and Blue Shield of Maryland, Inc. are listed in Appendix A.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	2
JURISDICTIONAL STATEMENT	2
RELEVANT STATUTORY PROVISIONS	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	8
A. *Introduction*	8
B. *This Court Should Grant Certiorari Because the Court Below Engaged in a Dangerous Misapplication of the Rooker-Feldman Doctrine*	11
C. *This Court Should Grant Certiorari in Order to Clarify and Define the Unique and Extraordinary Preemption Provisions of ERISA*	14
D. *This Court Should Grant Certiorari to Provide Guidance to Both State and Federal Courts as to the Scope of ERISA's Coverage*	16
CONCLUSION	22
APPENDIX	Submitted under separate cover

TABLE OF AUTHORITIES

Cases

	PAGE
Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981)	9
Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Engineers, 398 U.S. 281 (1970)	11, 12
Berry v. Ciba-Geigy Corp., 761 F.2d 1003 (4th Cir. 1985)	21
Blau v. Del Monte Corp., 748 F.2d 1348 (9th Cir. 1984), cert. denied, 474 U.S. 865 (1984)	17
Blum v. Stenson, 465 U.S. 886 (1984)	20
Calamia v. Spivey, 632 F.2d 1235 (5th Cir. 1980)	21
Chilton v. Savannah Foods & Indus., Inc., 814 F.2d 620 (11th Cir. 1987)	21
Cox v. Keystone Carbon Co., 861 F.2d 390 (3d Cir. 1988)	21
District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983)	11, 12, 13
Donovan v. Dillingham, 688 F.2d 1367 (11th Cir. 1982)	17
Durfee v. Duke, 375 U.S. 106 (1963)	14
Eaves v. Penn, 587 F.2d 453 (10th Cir. 1978)	20
Ed Miniat, Inc. v. Globe Life Ins. Group, Inc., 805 F.2d 732 (7th Cir. 1986)	17
Ford v. New York Cent. Teamsters Pension Fund, 506 F. Supp. 180 (W.D.N.Y.), aff'd, 642 F.2d 664 (2nd Cir. 1981)	19
General Motors Corp. v. Buha, 623 F.2d 455 (6th Cir. 1980)	16
Gilbert v. Burlington Industries, Inc., 765 F.2d 320 (2nd Cir. 1985), aff'd, 477 U.S. 901 (1986)	16
Gray v. New England Tel. & Tel. Co., 792 F.2d 251 (1st Cir. 1986)	19
Hensley v. Eckerhart, 461 U.S. 424 (1983)	20
Howard v. Parisian, Inc., 807 F.2d 1560 (11th Cir. 1987)	21

Huffman v. Pursue, Ltd., 420 U.S. 592, reh'g denied, 421 U.S. 971 (1975) 12

Hummell v. S.E. Rykoff & Co., 634 F.2d 446 (9th Cir. 1980) 20

In re Vorpahl, 695 F.2d 318 (8th Cir. 1982) 21

Int'l Longshoremen's Ass'n v. Davis, 476 U.S. 380 (1986) 10, 15

Iron Workers Local No. 272 v. Bowen, 624 F.2d 1255 (5th Cir. 1980) ..... 1[illegible]

Kalb v. Feuerstein, 308 U.S. 433 (1940) 14, 15

Katsaros v. Cody, 744 F.2d 270 (2nd Cir.), cert. denied, 469 U.S. 1072 (1984) 21

Kleinhans v. Lisle Savings Profit Sharing Trust, 810 F.2d 618 (7th Cir. 1987) 19

Lawrence v. Westerhaus, 749 F.2d 494 (8th Cir. 1984) 19–20

Marquardt v. North American Car Corp., 652 F.2d 715 (7th Cir. 1981) 19

Massachusetts Mutual Life Ins. Co. v. Russell, 473 U.S. 134 (1985) 19

McKnight v. Southern Life and Health Ins. Co., 758 F.2d 1566 (11th Cir. 1985) 20

Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58 (1987) 10, 14, 18

Moore v. Sims, 442 U.S. 415 (1979) 12

Pennzoil Co. v. Texaco, Inc., 481 U.S. 1 (1987) 11, 12

Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987) . 8, 9, 10, 21

Powell v. C&P Telephone Co. of Va., 780 F.2d 419 (4th Cir. 1985), cert. denied, 476 U.S. 1170 (1986) 19

Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923) 11

Scott v. Gulf Oil Corp., 754 F.2d 1499 (9th Cir. 1985) . 17

Sokol v. Bernstein, 803 F.2d 532 (9th Cir. 1986) 19

Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enterprises, Inc., 793 F.2d 1456 (5th Cir. 1986), reh'g denied, 797 F.2d 977 (5th Cir. 1986), cert. denied, 479 U.S. 1034 (1987), cert. denied, 479 U.S. 1089 (1987) 19

Turner v. CF&I Steel Corp., 770 F.2d 43 (3d Cir. 1985), cert. denied, 474 U.S. 1058 (1986) 21

Ursic v. Bethlehem Mines, 719 F.2d 670 (3d Cir. 1983) 20

Varhola v. Doe, 820 F.2d 809 (6th Cir. 1987) 19

Wickman v. Northwestern National Life Insurance Co., 9 EBC 1482 (D. Mass. 1987) 17

Statutes

28 U.S.C. §1254(1) 2

Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1001 et seq. . 3, 4, 7, 9, 10, 16, 17, 19

Labor Management Relations Act, 29 U.S.C. §185 ... 10

Regulations

29 C.F.R. §2510.3-3 17–18

Other Authorities

13A Wright, Miller and Cooper, Federal Practice & Procedure, Jurisdiction §3536 (1984) 14

1B Moore, Federal Practice ¶0.405[4.-1] (1988) 14

Chang, Rediscovering the Rooker Doctrine: Section 1983, Res Judicata and the Federal Courts, 31 The Hastings Law Journal 1337 (1980) 12

Texaco Inc. v. Pennzoil Co.: Some Thoughts On The Limits of Federal Court Power Over State Court Proceedings, 54 Fordham L.Rev. 767 (1986) 12

Texaco, Inc. v. Pennzoil Co.: Beyond a Crude Analysis of the Rooker-Feldman Doctrine's Preclusion of Federal Jurisdiction, 41 Miami L.Rev. 627 (1987) . 12

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Petitioner, Blue Cross and Blue Shield of Maryland, Inc., respectfully requests that this Court issue a Writ of Certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The Opinion of the United States District Court for the Southern District of Florida (Kenneth L. Ryskamp, J.) is unreported and is reproduced in Appendix B. The Opinion of the United States Court of Appeals for the Eleventh Circuit (Joseph W. Hatchett, J.) is reported at 868 F.2d 1550 (11th Cir. 1989) and is reproduced in Appendix C. The decision of the United States Court of Appeals for the Eleventh Circuit denying Blue Cross and Blue Shield of Maryland, Inc.'s Suggestion of Rehearing In Banc (Joseph W. Hatchett, J.) is unreported and is reproduced in Appendix D.[2]

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on April 5, 1989. On April 24, 1989, Blue Cross and Blue Shield of Maryland, Inc. filed a Suggestion of Rehearing In Banc. On May 15, 1989, the United States Court of Appeals denied Blue Cross and Blue Shield of Maryland, Inc.'s Suggestion of Rehearing In Banc. On May 30, 1989, the judgment of the United States Court of Appeals for the Eleventh Circuit was issued as a mandate. Thus, pursuant to Rule 20.4, Blue Cross and Blue Shield of Maryland, Inc.'s filing of the instant Petition at this time is proper. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

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[2] Copies of the Final Judgment and the Orders on Plaintiffs' Motion for Attorneys' Fees entered in this matter by the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida are reproduced in Appendix E and F, respectively. A copy of the Opinion of the Florida Fourth District Court of Appeal is reproduced in Appendix G.

RELEVANT STATUTORY PROVISIONS

Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§1132 and 1144 (1985).

§1132. *Civil Enforcement*

(a) *Persons empowered to bring a civil action*
A civil action may be brought —

(1) by a participant or beneficiary —

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provision of this subchapter; or

(6) by the Secretary to collect any civil penalty under subsection (i) of this section.

. . . . .

(e) *Jurisdiction*

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

. . . . .

§1144. *Other laws*

(a) *Supersedure; effective date.*

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

STATEMENT OF THE CASE

Stated simply, this case involves an insurance company's attempt to set aside a multi-million dollar judgment which is invalid under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1001 et seq., and which was rendered by a state court that had no subject matter jurisdiction.

The facts surrounding this dispute are as follows. Petitioner, Blue Cross and Blue Shield of Maryland, Inc. ("BCBSM"), is a non-profit Maryland corporation in the business of providing health insurance. In 1980, Association Financial Services, Inc. ("AFSI"), a brokerage firm that administers health insurance benefits for national level trade associations, decided to create a group health insur-

ance plan for the members of state service station dealers' associations that were affiliated with the Service Station Dealers of America ("SSDA"). BCBSM agreed to underwrite the plan.

Three contracts were executed naming the SSDA as the insured. The contracts created a "Group Plan" of health insurance. Enrollment was specifically limited to employees and dependents of employees of SSDA members. The Group Plan provided that participation (1) could only begin after BCBSM was notified that the applicant was an employee of an SSDA affiliate and (2) would be terminated on the last day of the month that a participant's employment status ended. The contracts required the SSDA affiliates to notify BCBSM each month of the changes in the status of employees.

The Group Plan contracts were assigned to AFSI which acquired the endorsement of the Allied Gasoline Retailers' Association of Florida ("AGRA"), the Florida affiliate of the SSDA. As a result, all of AGRA's members and their employees were eligible to enroll in the Group Plan. Blue Cross and Blue Shield of Florida, Inc. ("BCBSF"), a non-profit Florida insurance company, was the servicing plan for the Group Plan.

The Weiner Service Station ("Station") is located in Dania, Florida. Robert Weiner, Sr., Robert Weiner, Jr. and others work at the Station. Early in 1982, Robert Weiner, Sr. called AGRA's field representative, Al Jacobson, regarding the Group Plan. Jacobson subsequently met with Robert Weiner, Sr., explained the Group Plan to him, and gave him a benefit book. The benefit book stated that the coverage was only available to employees and their dependents and that when a participant's status as an employee ended, his insurance under the Group Plan ended. Since coverage was only available to employees of the Station if the Station was a member of AGRA, the Station joined AGRA and applied for insurance under the Group Plan. As a result, "the Station Plan" was formed.

Two applications were filled out for the Station's employees. Robert Weiner, Sr. applied for a "family policy," and his application listed him as an "employee" and showed "Weiner Service Station" as the "Name of Employer." Robert Weiner, Sr.'s family policy covered Robert Weiner, Sr. and his dependents, Margaret Weiner, Steven Weiner, and Mark Weiner. Robert Weiner, Jr. applied for an "individual policy," covering only himself, and his application also listed him as an "employee" and showed the "Weiner Service Station" as the "Name of Employer." Under the terms of the Group Plan, the Station was responsible for payment of premiums and the Station did pay the premiums for both Robert Weiner, Sr. and Robert Weiner, Jr.

In the Summer of 1982, Steven Weiner became seriously ill and was later diagnosed as having the Acquired Immune Deficiency Syndrome. Later that summer, Mark Weiner was involved in an accident and became a quadriplegic. Coverage for the Weiners was provided from the Summer of 1982 until August 8, 1983. On that date, BCBSM determined that Steven Weiner and Mark Weiner were no longer covered by the Group or Station plans and the payment of benefits was discontinued.

In September 1983, Robert Weiner, Sr. filed suit against BCBSM and BCBSF in the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida (the "State Trial Court") alleging that they had improperly denied benefits to Robert Weiner, Sr. and consequently, breached their duty of good faith and fair dealing, breached their fiduciary duty, committed fraud, and violated Florida Statute 627.66.5.

In March 1984, BCBSM informed the Weiners that it would reinstate coverage and pay all back claims due and since that time, it has processed all claims and paid all contractual benefits due under the Group and Station Plans.

In December 1984, the original Complaint was amended and Margaret Weiner, Mark Weiner, and Robert Weiner, Sr.,

as Personal Representative of the Estate of Steven Weiner, were added as plaintiffs.

In December 1985, the Weiners filed a Second Amended Complaint. In that Complaint, the Weiners alleged that BCBSM and BCBSF had committed three common law torts — fraud, intentional infliction of mental distress, and negligence. The Second Amended Complaint sought recovery of compensatory and punitive damages resulting from BCBSM and BCBSF's alleged improper failure to pay plan benefits.

On September 25, 1986, a jury verdict was returned in favor of the Weiners. The jury found BCBSM liable for fraud, intentional infliction of mental distress, and negligence and returned a verdict against BCBSM for $500,000 compensatory damages and $5,000,000 punitive damages. The jury also found BCBSF liable for fraud and intentional infliction of mental distress and returned a verdict against BCBSF for $200,000 compensatory damages and $1,500,000 punitive damages. In addition, the State Trial Court awarded attorneys' fees to the Weiners against BCBSM and BCBSF jointly in the amount of $1,411,600 (based upon three times the lodestar rate calculation). BCBSM and BCBSF promptly noticed their appeal to the Florida Fourth District Court of Appeal (the "State Appellate Court").

On April 26, 1989, the State Appellate Court affirmed the State Trial Court's judgment and award as to BCBSM and reversed the State Trial Court's judgment and award as to BCBSF. BCBSM promptly filed a Motion for Rehearing and Rehearing En Banc which was denied.

On April 14, 1988, prior to the issuance of the State Appellate Court's decision, BCBSM filed a Verified Complaint and Request for Declaratory Judgment and Injunctive Relief in the United States District Court for the Southern District of Florida ("the District Court"). The jurisdiction of that Court was invoked pursuant to Section 502(f) of ERISA, 29 U.S.C. §1132(f). The Complaint sought a declaration that

the judgment rendered by the the State Trial Court be declared void and unenforceable and that the Weiners be enjoined from taking any further action before the State Appellate Court and from attempting to enforce the State Trial Court's judgment and award of attorneys' fees. The basis for the Complaint was, in essence, that federal preemption under ERISA divested the state court of subject matter jurisdiction over this action.

On April 20, 1988, BCBSF intervened in the District Court proceedings and filed its own Motion for Preliminary Injunction.

On May 17, 1988, the District Court denied the Motions for Preliminary Injunction and stayed proceedings in the District Court pending resolution of the case by the state courts.

On April 5, 1989, the United States Court of Appeals for the Eleventh Circuit affirmed the District Court's denial of the preliminary injunction and its order of abstention, and remanded this action to the District Court with instructions to dismiss it as it relates to the request for permanent injunction for lack of subject matter jurisdiction. The Eleventh Circuit's Opinion was based solely on the *Rooker-Feldman* doctrine and did not address any of the other issues before the Court. BCBSM filed a Suggestion of Rehearing In Banc which was denied. The case has since been dismissed in its entirety by the District Court.

REASONS FOR GRANTING THE WRIT

A. Introduction.

ERISA, enacted by Congress in 1974, is a complex and thorough law governing employee benefit plans. This Court has recognized that ERISA "comprehensively regulates, among other things, employee welfare benefit plans...", *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 44 (1987), and has observed on several occasions that the provisions of ERISA "are deliberately expansive and designed to establish pension plan regulation as exclusively a federal concern." *Pilot*

Life, 481 U.S. at 46, quoting *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981). In establishing ERISA's comprehensive scheme, Congress balanced ERISA's broad coverage with its limited remedies, thus effectuating a trade-off between coverage and liability which must be enforced and protected by the federal courts.

To ensure that ERISA remained a matter of exclusively federal concern and that participants and beneficiaries would have ready access to the federal courts, Congress provided that in all ERISA cases except those brought under §1132(a)(1)(B) — suits to recover plan benefits — the federal courts would have exclusive jurisdiction. 29 U.S.C. §1132(e)(1).

In order to make ERISA's remedies exclusive and nationally uniform, Congress also provided ERISA with a unique and extraordinary preemption provision. 29 U.S.C. §1144. This Court discussed the expansive nature of ERISA preemption in *Pilot Life*, wherein a plan participant whose benefits had been terminated alleged several state common law torts, including breach of fiduciary duty and fraud, and sought to recover compensatory damages for mental and emotional distress and punitive damages. This Court held that the plan participant's state common law tort claims were completely preempted by ERISA.

This Court began by recognizing the two basic tenets of ERISA preemption: (1) ERISA preempts any state law that "relates to" an employee benefit plan; and (2) the only exception to this rule is if the state law is one "which regulates insurance." 481 U.S. at 45. This Court held that under the "broad common-sense meaning" of the term "relates to," the participant's state common law torts alleging improper processing of claims under an employee benefit plan related to the plan. *Id.* at 47. In addition, this Court held that common law torts are not laws specifically designed to regulate insurance. *Id.* at 50-51. This Court therefore held that state common law torts based on alleged improper processing of claims under an employee benefit plan "undoubtedly meet the criteria for preemption." *Id.* at 48.

On the same day that this Court decided *Pilot Life*, it also decided *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987) and went one step further by holding that not only does ERISA preempt state common law torts, it totally displaces them. This Court referred by analogy to its prior decisions regarding the preemptive effect of §301 of the Labor Management Relations Act, 29 U.S.C. §185, which is so powerful that preemption -- normally a defense — becomes self-acting and destroys any state law claim infringing on the federal statute. This Court held that because ERISA's preemption provision was modeled after §301, ERISA similarly displaces state common law tort remedies with the remedies provided for in §1132(a).

Preemption of this magnitude is a matter of subject matter jurisdiction; therefore, this Court has held that if a state law claim is preempted, the state court loses its jurisdiction over the matter. *See Metropolitan Life*, 481 U.S. at 66-67; *see also Int'l Longshoremen's Ass'n v. Davis*, 476 U.S. 380, 391-392 (1986).

As will be demonstrated below, the Weiners' state tort claims were preempted by ERISA and should have never been tried in the State Trial Court, which had no subject matter jurisdiction over them. The vitally important policies which Congress sought to protect by making ERISA a matter of exclusively federal concern are undermined by federal and state court decisions such as the decisions in the case at bar. Despite this Court's pronouncements regarding the unique and extraordinary preemptive power of ERISA, the Eleventh Circuit has permitted the Florida state courts to continue to apply tort law in a case which is obviously preempted by ERISA, the result being the imposition of a multi-million dollar judgment on an out-of-state insurance company. This Court should grant certiorari to prevent this miscarriage of justice, to rectify the dangerous misapplication of the *Rooker-Feldman* doctrine by the Court below, to clarify and define ERISA's preemption provisions, and to provide guidance to state and federal courts as to the scope of ERISA's coverage.

B. **This Court Should Grant Certiorari Because the Court Below Engaged in a Dangerous Misapplication of the *Rooker-Feldman* Doctrine**

It is a well-settled principle that federal court review of judgments rendered by state courts should normally occur in the Supreme Court. *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 24 (1987) (Marshall, J., dissenting); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 416 (1923); *see also Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 286 (1970). This principle, commonly referred to as the *Rooker-Feldman* doctrine, normally bars a federal district court from acting as an appellate forum for a dissatisfied state court litigant.

In *Rooker v. Fidelity Trust Co.*, the Rookers executed to Fidelity Trust Co., as trustee, two warranty deeds to property. Judgment was entered for Fidelity, foreclosing the mortgage and directing a sale of the property. The trial court's decision was affirmed by the Indiana Supreme Court. The Rookers brought suit in federal district court seeking a declaration that the state court judgment was unconstitutional because it violated the Contract clause of the federal Constitution, as well as the due process and equal protection clauses of the fourteenth amendment. The Supreme Court held that the federal district court had no jurisdiction to review the state court judgment and therefore, affirmed the district court's dismissal of the action.

In *District of Columbia Court of Appeals v. Feldman*, the District of Columbia Court of Appeals denied the plaintiff's petition for a waiver of the District's bar requirement that an applicant must graduate from an accredited law school. In federal district court, Plaintiff alleged certain constitutional violations (which were not raised in the state court) and sought injunctive relief. On certiorari, the Supreme Court dismissed Plaintiff's claim for lack of subject matter jurisdiction, holding that federal district courts have no jurisdiction over constitutional challenges to state court decisions.

The *Rooker-Feldman* doctrine stands for the proposition that a district court cannot review state court judgments where "constitutional claims ... are inextricably intertwined" with the state court's judgment. *Feldman*, 460 U.S. at 483 n.16. Under *Rooker-Feldman*, in such instances "the district court is in essence being called upon to review the state-court decision" and therefore has no jurisdiction. *Id.* at 483-484 n.16.

The *Rooker-Feldman* doctrine stems from several basic principles, namely: (1) state courts are just as obligated and competent as federal courts to decide federal constitutional questions, and such constitutional issues may be avoided if the case is decided on state law grounds, *Moore v. Sims*, 442 U.S. 415, 430 (1979); *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 610-611, *reh'g denied*, 421 U.S. 971 (1975); *Feldman*, 460 U.S. at 482 n. 16; (2) a path is available through the state appellate system to the Supreme Court; and (3) a waste of judicial resources and unnecessary friction between state and federal courts might ensue if a federal district court intervened to override a state court decision. *See Pennzoil Co.*, 481 U.S. at 10-11; *see also Atlantic Coast Line R. Co.*, 398 U.S. at 286.

Invariably, the cases decided under the *Rooker-Feldman* doctrine center upon a federal constitutional challenge to state action. The federal court challenge is typically to a state court decision involving an issue of purely state concern. *See Texaco Inc. v. Pennzoil Co.: Some Thoughts On The Limits of Federal Court Power Over State Court Proceedings*, 54 Fordham L.Rev. 767 (1986); *Texaco, Inc. v. Pennzoil Co.: Beyond a Crude Analysis of the Rooker-Feldman Doctrine's Preclusion of Federal Jurisdiction*, 41 Miami L.Rev. 627 (1987); Chang, *Rediscovering the Rooker Doctrine: Section 1983, Res Judicata and the Federal Courts*, 31 The Hastings Law Journal 1337 (1980).

The Eleventh Circuit's application of the *Rooker-Feldman* doctrine in this case is a classic example of an attempt to fit a square peg into a round hole. As noted previously, one of the fundamental bases for the *Rooker-Feldman* doctrine is

this Court's belief that state courts are just as obligated and competent to decide federal constitutional questions as are federal courts, and such constitutional issues may be avoided if the case is decided on state law grounds. This rationale simply does not apply to the case at bar. Congress and this Court have said that jurisdiction over ERISA issues belongs in the federal courts; moreover, there are no state law issues involved, only exclusively federal ERISA issues. The state courts are not competent to decide ERISA issues — this is precisely the reason why Congress vested exclusive jurisdiction over ERISA issues in the federal courts. Moreover, there are obviously no federalism concerns in an area which Congress has designated as a matter of exclusively federal concern.

In no case, other than the case at bar, has any court ever applied the *Rooker-Feldman* doctrine where ERISA preemption was involved. Similarly, no court has ever held that the *Rooker-Feldman* doctrine prevents collateral attack in a federal court of a state court judgment where the state court lacks subject matter jurisdiction because of federal preemption. In the case at bar, the Court below did not dispute these facts — it simply ignored them.

The *Rooker-Feldman* doctrine is also inapplicable to the case at bar because the issue of ERISA preemption is not "inextricably intertwined" with the state court judgment. In *Feldman*, this Court held that Rooker prevents a district court from reviewing a state court judgment where the "constitutional claims presented to a United States District Court are inextricably intertwined" with the state court's judgment. 460 U.S. at 482 n.16.[3] In the case at bar, the State Trial Court tried only the tort claims raised by the Weiners and did not consider whether the case involved an ERISA plan. In fact, neither *Pilot Life* nor *Metropolitan Life* had been decided when the state court entered judgment. Thus,

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[3]This Court's explicit reference to "constitutional claims" is further evidence of the fact that the *Rooker-Feldman* doctrine applies only to cases involving a constitutional challenge to state action.

the ERISA preemption issue was not inextricably intertwined in its decision.

It is not merely an obvious misapplication of the *Rooker-Feldman* doctrine to apply it in an area that is uniquely federal; if the decision below stands, it will seriously undermine the important federal policies which led to the enactment of ERISA. This Court must grant certiorari in this case to protect these vitally important interests.

C. **This Court Should Grant Certiorari in Order to Clarify and Define the Unique and Extraordinary Preemption Provisions of ERISA.**

In *Metropolitan Life Ins. Co. v. Taylor*, this Court emphasized the unique and extraordinary nature of ERISA preemption. The Eleventh Circuit's decision below compromises the objectives of this expansive preemption by refusing to permit collateral attack of a judgment entered by a state court which had no subject matter jurisdiction because of ERISA preemption. The doctrine permitting collateral attack upon judgments entered without jurisdiction is firmly settled:

> . . . [W]hen a federal statute has vested exclusive jurisdiction of a particular type of case in the federal courts, the finding by a state court that it has jurisdiction over such a case would not preclude collateral attack upon the judgment rendered in the state court.

13 A. Wright, Miller and Cooper, *Federal Practice & Procedure, Jurisdiction*, §3536 at 539-540 (1984); 1B Moore, *Federal Practice* 0.405[4.-1] (1988).

In *Durfee v. Duke*, 375 U.S. 106, 114 (1963), this Court recognized the exception to the general rule precluding collateral attack when, as in the present case, federal preemption is involved. In *Durfee*, this Court cited its prior decision in *Kalb v. Feuerstein*, 308 U.S. 433 (1940), wherein this Court permitted a bankrupt farmer to collaterally attack a state court judgment on the grounds that Congress had pre-

empted state court jurisdiction in cases involving bankrupt farmers. This Court found that because Congress had preempted state court jurisdiction over this matter, the state court judgment "was not merely erroneous but was beyond its power, void, and subject to collateral attack." *Id.* at 438. This Court stated, in relevant part:

> "The States cannot, in the exercise of control over local laws and practice, vest State courts with power to violate the supreme law of the land. The Constitution grants Congress exclusive power to regulate bankruptcy and under this power Congress can limit the jurisdiction which courts, State or Federal, can exercise over the person and property of a debtor who duly invokes the bankruptcy law. If Congress has vested in the bankruptcy courts exclusive jurisdiction over farmer-debtors and their property, and has by its Act withdrawn from all other courts all power under any circumstances to maintain and enforce foreclosure proceedings against them, its Act is the supreme law of the land which all courts — State and Federal — must observe."

308 U.S. at 439 (footnote omitted).

Kalb was also recently followed by this Court in *Int'l Longshoremen's Ass'n v. Davis*, 476 U.S. at 391, wherein this Court held that when state court proceedings are preempted by the NLRA, "then state jurisdiction is extinguished."[4] *See*

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[4] Chief Justice Rehnquist wrote a concurring opinion in *Davis* that was joined by three other Justices. In that opinion, he disagreed with the majority's decision to allow the ILA to raise its NLRA preemption defense on appeal when the defense had not been timely raised at trial. Nevertheless, Chief Justice Rehnquist conceded that if Congress had specifically preempted state court jurisdiction, he would have permitted the NLRA preemption defense to be raised at any time. In the case at bar, Congress has expressly preempted state court jurisdiction and thus, even Chief Justice Rehnquist and the three other concurring Justices would recognize ERISA preemption in the present case.

also Gilbert v. Burlington Industries, Inc., 765 F.2d 320 (2nd Cir. 1985), *aff'd*, 477 U.S. 901 (1986); *General Motors Corp. v. Buha*, 623 F.2d 455 (6th Cir. 1980).

The lower court decisions in the case at bar establish that there is much confusion about the scope of ERISA's preemption provisions. Moreover, they reveal the natural tendency of a state court to be antagonistic to the notion that state tort claims are preempted by ERISA. It is understandable that a state court may be somewhat incredulous when faced with a claim that state tort law and remedies are completely displaced by ERISA. This case illustrates that state courts do misinterpret ERISA due to either their failure to understand its scope or their desire to protect their own tort law. Obviously, because of the natural reluctance of state courts to relinquish control over what they perceive as tort claims, litigants must be able to collaterally attack an erroneous state court decision respecting the scope of ERISA preemption — otherwise, ERISA's unique and extraordinary preemption provisions and its exclusive federal jurisdiction provisions will be devoid of any real meaning.

D. **This Court Should Grant Certiorari to Provide Guidance to Both State and Federal Courts as to the Scope of ERISA's Coverage.**

The scope of ERISA's coverage is immense. This is clear from ERISA's broad definition of the term "employee benefit plan" which provides that an employee benefit plan may be either an employee welfare benefit plan, an employee pension benefit plan, or both. 29 U.S.C. §1002(3). Section 1002(1) defines an employee welfare benefit plan as follows:

> [A]ny plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise . . . medical, surgical, or hospital care or

> benefits, or benefits in the event of sickness, accident, disability, death or unemployment. . . .

Thus, the five statutory components of an employee welfare benefit plan are: (1) a plan, fund or program, (2) established or maintained, (3) by an employer or by an employee organization or both, (4) for the purpose of providing benefits, (5) to participants or their beneficiaries. *See Donovan v. Dillingham*, 688 F.2d 1367, 1371 (11th Cir. 1982); *Ed Miniat, Inc. v. Globe Life Ins. Group, Inc.*, 805 F.2d 732, 738 (7th Cir. 1986); *Wickman v. Northwestern National Life Insurance Co.*, 9 EBC 1482, 1484 (D. Mass. 1987).

The State Appellate Court, after what can at best be termed a cursory analysis, found that the plan at issue was not an "employee welfare benefit plan." The State Appellate Court based its decision on its conclusion that Robert Weiner, Sr. was a sole proprietor of a business who simply purchased a group insurance policy for his family. This conclusion is not supported by fact or law. The Group Plan is a large plan, comprised of many employers and employees. It is sponsored by AGRA, an association of employers. ERISA specifically includes "associations of employers" in its definition of the term "employer." 29 U.S.C. §1002(5). Thus, it is undeniable that AGRA is an "employer" as defined in ERISA. The Group Plan provided AGRA members the opportunity to receive health insurance. Thus, the undisputed facts establish that the Group Plan meets the five statutory prerequisites set forth above and is an "employee welfare benefit plan."

The Station Plan also qualifies as an "employee welfare benefit plan." It has been generally held that an employee welfare benefit plan may be created without a formal, written plan. *Donovan*, 688 F.2d at 1372; *Blau v. Del Monte Corp.*, 748 F.2d 1348, 1352 (9th Cir. 1984), *cert. denied*, 474 U.S. 865 (1984); *Scott v. Gulf Oil Corp.*, 754 F.2d 1499, 1504 (9th Cir. 1985); *Wickman*, 9 EBC at 1485. In addition, the regulations establish that an employer needs only one common law employee to qualify as an employer under ERISA. 29 C.F.R.

§2510.3-3. The Station was obviously an employer since Robert Weiner Sr., Robert Weiner Jr. and others were employed at the Station, and both Robert Weiner Sr. and Robert Weiner Jr. applied for insurance under the Group Plan as employees of the Station. By joining the Group Plan, the Station provided its employees and their dependents with the opportunity to receive health insurance and formed an ERISA-covered employee welfare benefit plan.

The State Appellate Court's finding that the plans in question were not ERISA plans is an illustration of the vital importance of exclusive federal court jurisdiction over ERISA issues. As noted previously, state courts often do not understand the scope of ERISA or the policy trade-offs made by Congress as reflected in ERISA. In this case, the State Appellate Court ignored established federal court precedent and relied upon mere instinct to conclude that the plan at issue was not an ERISA plan. The State Appellate Court assumed that a small business owned by a sole proprietor would not be creating an ERISA plan by buying health insurance for two employees. However, federal court decisions establish that ERISA applies to all employers, whether large or small. The State Appellate Court overlooked the fact that many millions of American workers are employed by small business and that Congress wanted them and their employers to be covered by ERISA, the same as the workers and owners of big business. The State Appellate Court also overlooked the fact that the plan at issue is sponsored by an association of small employers, most, if not all, of whom would be unable to obtain similar insurance individually at the same rates. This Court must give meaning to the unique and extraordinary scope of ERISA's coverage and preemption which it announced in *Metropolitan Life Ins. Co. v. Taylor* and this is the case in which it should do so.

The state court judgments in this case are exactly the type of state judicial involvement which Congress intended to prevent when it enacted ERISA's broad preemption provision. This Court, in *Metropolitan Life Ins. Co. v. Taylor*, recognized that ERISA remedies displace those provided for in

state tort law. Had this suit been brought in federal court, as ERISA requires, the litigation would have taken a vastly different course.

First, extra-contractual damages, including punitive damages, are not recoverable in an action under ERISA. *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134 (1985). Although the holding of this Court in *Massachusetts Mutual* was expressly limited to ERISA §1109, numerous Circuit Courts of Appeal have since held that it is properly extended to ERISA §1132 cases, like the case at bar. *See Varhola v. Doe*, 820 F.2d 809 (6th Cir. 1987); *Kleinhans v. Lisle Savings Profit Sharing Trust*, 810 F.2d 618 (7th Cir. 1987); *Sokol v. Bernstein*, 803 F.2d 532 (9th Cir. 1986); *Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enterprises, Inc.*, 793 F.2d 1456 (5th Cir. 1986), *reh'g denied*, 797 F.2d 977 (5th Cir. 1986), *cert. denied*, 479 U.S. 1034 (1987), *cert. denied*, 479 U.S. 1089 (1987); *Powell v. C&P Telephone Co. of Va.*, 780 F.2d 419 (4th Cir. 1985), *cert. denied*, 476 U.S. 1170 (1986). Thus, had this case been tried in federal court under established ERISA law, extra-contractual damages of any type, including punitive damages and damages for intentional infliction of mental distress, could not have been awarded. Under Florida tort law, however, these damages are recoverable. Consequently, because this case was decided under state common law and not ERISA, BCBSM and BCBSF were found liable for $7,200,000 in extra-contractual damages.

Second, the award of attorneys' fees would also have been very different if this case had been brought in federal court under ERISA. Although this Court has never addressed this issue, numerous federal courts have set forth detailed guidelines governing when attorneys' fees should be granted in an ERISA case. *Gray v. New England Tel. & Tel. Co.*, 792 F.2d 251 (1st Cir. 1986); *Ford v. New York Cent. Teamsters Pension Fund*, 506 F. Supp. 180 (W.D.N.Y.), *aff'd*, 642 F.2d 664 (2nd Cir. 1981); *Iron Workers Local No. 272 v. Bowen*, 624 F.2d 1255 (5th Cir. 1980); *Marquardt v. North American Car Corp.*, 652 F.2d 715 (7th Cir. 1981); *Lawrence v. Westerhaus*,

749 F.2d 494 (8th Cir. 1984); *Hummell v. S.E. Rykoff & Co.*, 634 F.2d 446 (9th Cir. 1980); *Eaves v. Penn*, 587 F.2d 453 (10th Cir. 1978); *McKnight v. Southern Life and Health Ins. Co.*, 758 F.2d 1566 (11th Cir. 1985). These Courts have held that in determining whether to award attorneys' fees, the factors to be considered are: (1) the degree of the opposing parties' culpability or bad faith; (2) the ability of the opposing parties to satisfy an award of attorneys' fees; (3) whether an award of attorneys' fees against the opposing parties would deter other persons acting under similar circumstances; (4) whether the parties requesting attorneys' fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA itself; and (5) the relative merits of the parties' positions.

These factors were not considered by the Florida State Court in determining whether to award attorneys' fees in this case. Rather, the award of attorneys' fees was based on a provision of the Florida Statutes permitting the award of attorneys' fees in controversies over the coverage of insurance policies. Thus, the initial decision whether or not to award attorneys' fees at all would have been different had the case been brought in federal court under ERISA.

Moreover, the amount of attorneys' fees awarded under ERISA would have been different than the amount awarded by the State Trial Court. The Third Circuit has stated that Congress did not intend the award of attorneys' fees for private enforcement of ERISA to be used as a means to inflict punishment. *Ursic v. Bethlehem Mines*, 719 F.2d 670 (3d Cir. 1983).

In a myriad of federal attorneys' fees cases, including this Court's decisions in *Blum v. Stenson*, 465 U.S. 886 (1984) and *Hensley v. Eckerhart*, 461 U.S. 424 (1983), the federal courts have established a well-structured procedure for the granting of reasonable attorneys' fees under federal law. The State Trial Court found that a multiplier of three should be used for a substantial portion of the total lodestar. The use of this multiplier produced an attorneys' fees award that is far from

reasonable. It is inconceivable that any federal court would have awarded three times the lodestar. Therefore, if this case had been litigated in the federal court, under ERISA, any award of attorneys' fees would have been considerably smaller, even assuming that the Weiners would have won.

Finally, the vast majority of the federal courts which have addressed the issue have held that jury trials are not permitted under ERISA. *See Chilton v. Savannah Foods & Indus., Inc.*, 814 F.2d 620 (11th Cir. 1987); *Berry v. Ciba-Geigy Corp.*, 761 F.2d 1003 (4th Cir. 1985); *Katsaros v. Cody*, 744 F.2d 270 (2nd Cir.), *cert. denied*, 469 U.S. 1072 (1984); *Cox v. Keystone Carbon Co.*, 861 F.2d 390 (3d Cir. 1988); *Turner v. CF&I Steel Corp.*, 770 F.2d 43 (3d Cir. 1985), *cert. denied*, 474 U.S. 1058 (1986); *Calamia v. Spivey*, 632 F.2d 1235 (5th Cir. 1980); *In re Vorpahl*, 695 F.2d 318 (8th Cir. 1982); *Howard v. Parisian, Inc.*, 807 F.2d 1560 (11th Cir. 1987). Under Florida law, however, a jury trial is permitted for tort actions. Therefore, if this suit had been brought under ERISA, it would have been decided by a judge and not a jury.

The Supreme Court in *Pilot Life* stated that the specific remedies set forth in §1132 represent a:

> careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans. . . . [T]he federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA.

481 U.S. at 54. The state court judgment in the case at bar makes a mockery of this statement. The goals established by Congress in ERISA cannot be achieved unless all courts — state and federal — understand the unique and extraordinary nature of ERISA preemption and the importance of federal court jurisdiction over ERISA issues. This Court must grant certiorari in this case in order to prevent further misinterpretation of ERISA's provisions.

CONCLUSION

By invoking the *Rooker-Feldman* doctrine in this case, and thereby prohibiting a federal court from deciding the ERISA issues in this case, the Eleventh Circuit has failed to enforce the unique and extraordinary preemeptive power of ERISA, as announced by Congress and this Court, and has allowed the Florida state courts to proceed with a case covered by ERISA over which they have no subject matter jurisdiction. The *Rooker-Feldman* doctrine is plainly inapplicable to this case and should not be used to prohibit a collateral attack where vital federal interests are at stake.

For all of the foregoing reasons, BCBSM respectfully requests that this Court issue a Writ of Certiorari to review the decision rendered in the captioned-matter by the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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August 14, 1989

89-250

No.

Supreme Court, U.S.
FILED
AUG 14 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

BLUE CROSS AND BLUE SHIELD
OF MARYLAND, INC.,

Petitioner,

v.

ROBERT WEINER, SR., MARGARET WEINER, MARK WEINER,
AND ROBERT WEINER, SR. AS PERSONAL REPRESENTATIVE
OF THE ESTATE OF STEVEN WEINER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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The Daily Record Co., Baltimore, MD 21202

TABLE OF CONTENTS

	PAGE
APPENDIX A	1
APPENDIX B	3
APPENDIX C	11
APPENDIX D	23
APPENDIX E	25
APPENDIX F	29
APPENDIX G	41

APPENDIX A

Pursuant to Rule 28.1, following are the corporate affiliates of Blue Cross and Blue Shield of Maryland, Inc.:

Blue Cross and Blue Shield of Maryland Finance Company, Inc.
Employers Compliance Services, Inc.
Sterling Health Services, Inc.
Maryland Medical Services, Inc.
DBG Holdings, Inc.
Community Health Services, Inc.
Free State Health Plan, Inc.
Healthline, Inc.
PerTek, Inc.
Benefit Services International, Inc.
Free State Management, Inc.
LifeCard, Inc.
Columbia Medical Plan, Inc.
Health Management Corporation, Inc.
Willse and Associates, Inc.
Columbia Free State Management, Inc.
Twin Knolls Pharmacy, Inc.
Patuxent Medical Group, Inc.
Columbia Dental Plan, Inc.
Patuxent Surgicare, Inc.
Greenspring Mental Health Services, Inc.
Judgment Process Company, Inc.
Columbia Optical Management, Inc.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 88-6290-Ryskamp

BLUE CROSS AND BLUE SHIELD
OF MARYLAND, INC.,

Plaintiff,

BLUE CROSS AND BLUE SHIELD
OF FLORIDA, INC.,

Plaintiff-Intervenor,

vs.

ROBERT WEINER, SR., MARGARET
WEINER, MARK WEINER, and
ROBERT WEINER, SR., as
Personal Representative of
the Estate of Steven Weiner,

Defendants.

ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION

Procedural Background

This cause is before the court upon plaintiffs'[1] motion for preliminary and permanent injunction against the Weiners (hereinafter the "defendants") enjoining them from taking

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[1] "Plaintiffs" refer to Blue Cross and Blue Shield of Maryland and Blue Cross and Blue Shield of Florida, the latter of which has filed an unopposed motion to intervene and is similarly situated with BCBS (Maryland) before this court. Where distinctions are necessary, the labels "Maryland" and "Florida" will be used.

any further action on appeal or for enforcement of the judgment and award of attorneys' fees rendered in the Circuit Court of the 17th Judicial Circuit in and for Broward County, Florida[2] (hereinafter "state trial court"), which is now on appeal to the Fourth District Court of Appeal in the State of Florida (hereinafter "state appellate court")[3]. In the state trial court action, the defendants sought damages against Maryland, their insurer, and Florida, their servicing agent, for fraud, intentional infliction of emotional distress and negligence. After two years of discovery and eighteen (18) days of trial, a jury returned a verdict in the defendants' favor on September 15, 1986, and final judgment was entered thereon. In the action filed in this court, plaintiffs seek a declaratory judgment that the state trial court's judgment and award of attorney fees are null and void.

Arguments Presented

Plaintiffs claim that the insurance policy at issue in the state trial court qualifies as a "welfare plan" or "employee benefit plan" under the Employee Retirement Income Security Act (hereinafter "ERISA"), 29 U.S.C. Sec. 1002 (West 1985). Accordingly, plaintiffs maintain that the defendants' (as employees to the plan) state common law tort claims—upon which the state trial court's judgement are based—are preempted by ERISA, 29 U.S.C. Sec. 1144(a), and as such, the state trial court's judgment may be collaterally attacked because it did not have subject matter jurisdiction over the case. In response, the defendants assert that the insurance

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[2] The case is *Weiner, et al v. Blue Cross/Blue Shield of Maryland, et al.* Case No. 84-00840 CH.

[3] The case is *Blue Cross/Blue Shield of Maryland, Inc., et al.*, Case No. 4-86-2927 and *Blue Cross/Blue Shield of Florida, Inc., v. Weiner, et al.*, consolidated case Nos. 4-86-2294, 4-86-2925, 4-86-2926, and 4-86-2899.

policy was not an ERISA plan, the state trial court's judgment may not be collateraly [sic] attacked, and that on the facts of this case there is a strong policy in favor of abstention.

Both parties spent considerable time in their memoranda of law and during oral argument before this court arguing the issue of whether the insurance plans under examination qualifies as an ERISA plan. The court makes no determination of this issue. The threshold question here is whether the state court in the first instance may resolve this ERISA issue. After a careful review of the pleadings in this case, the supporting and opposing memoranda of law, and after conducting extensive oral argument on the issues presented, the court denies the petition for preliminary injunction.

Discussion

The determination of whether to grant a preliminary injunction is based on a review of four factors: (1) whether the plaintiff will suffer irrevocable harm if a preliminary injunction is not granted; (2) whether the plaintiff has a substantial probability of succeeding on the merits; (3) whether the threatened harm to the plaintiff outweighs the harm a preliminary injunction will cause to the defendant; and (4) whether the public interest is served by a preliminary injunction. *See Buchanan v. United States Postal Service*, 508 F.2d 259, 266 (5th Cir. 1975); Wright & Miller, *Federal Practice and Procedure*, Sec. 2948 at 430-31 (1973). Although there is no mechanical application of these factors, "[p]erhaps the single most important prerequisite for the issuance of a preliminary injunction is a demonstration that if it is not granted the applicant is likely to suffer irreparable harm before a decision on the merits can be rendered." Wright & Miller, *Federal Practice and Procedure*, Sec. 2948 at 431 (1973). Contrary to plaintiff's comparison between the federal and state fora, the state courts are fully capable and competent to properly adjudicate the threshold ERISA jurisdiction issue presented by this case.

On May 3, 1988 plaintiffs appeal will be heard by the Fourth District Court of Appeals. In this appeal, plaintiffs will raise for the first time in the state courts the ERISA jurisdiction issue. (Appendix in support of defendants' memorandum in opposition to plaintiffs' motion for preliminary injunction at 10-15.) The plaintiff did not raise the ERISA jurisdiction issue in the state trial court. On April 6, 1987, the Supreme Court held for the first time that state common law causes of action asserting improper processing of claims under employee benefit plans are preempted by ERISA. *See Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. – –, 95 L.Ed.2d 39 (1987); *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. – –, 95 L.Ed.2d 55 (1987). This ruling came after the final judgment in the state court action and forms the basis of defendants' contention that the state trial court was without jurisdiction to hear the alleged ERISA case. This jurisdiction issue can be raised at anytime—even on appeal. Therefore, far from being "irreparably harmed" in denying the application for a preliminary injunction, plaintiffs will present its ERISA jurisdiction issue to a competent appellate panel.

Further, the "public interest" will not be served by a preliminary injunction. Plaintiffs state that "one of the main goals of ERISA is the development of a national, uniform law" and concludes that by "[e]njoining [defendants] from requesting the Florida courts to exceed their jurisdiction and render a decision impermissible under ERISA is certainly in the public interest." (Maryland memorandum of law in support of preliminary injunction at 22). Plaintiffs self-serving conclusions, however, do not follow from its premise. As stated above, state courts have the power and competency to resolve the threshold ERISA jurisdiction question, and in so doing this court is confident that the state courts will preserve the development of the national, uniform ERISA law. In fact, by *not* allowing state courts to determine the jurisdiction issue presented in cases similar to the one at bar, federal courts would disserve the public interest by ignoring the all-important principles of "federal-

ism" and comity. This court will abstain from interfering with the ongoing state court proceedings under the authority of *Younger v. Harris*,[4] 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971) (strong federal policy against federal court interference with pending state judicial proceedings absent extraordinary circumstances). *See Colorado River Water Conservation District v. United States*, 472 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976) (where case is within *Younger*, no discretion to grant injunctive relief); *Juidice v. Vail*, 430 U.S. 327, 97 S.Ct. 1211, 51 L.Ed.2d 376 (1977); *Middlesex County Ethics Committee v. Gorden*, 457 U.S. 423, 102 S.Ct. 2515, 73 L.Ed.2d 116 (1982); *Pennzoil Co. v. Texas, Inc.* –U.S.–, 107 S.Ct. 1519 (1987) (state courts must be given the proper respect to resolve federal questions presented in the state forum).

Finally, the court makes no judgment as to whether the plaintiffs have a "substantial probability of succeeding on the merits." In their action for declaratory relief, plaintiffs request that this court declare the state trial court judgment null and void because the state trial court acted beyond its subject matter jurisdiction. Every court—even the state

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[4] As a condition precedent to abstaining this court found that plaintiffs' request for injunctive relief is an attempt to enjoin ongoing state proceedings, that plaintiffs had an opportunity to present their federal claims in the state forum, and that important state interests are involved in the state court proceedings. *See, e.g., Browning Corp.*, 624 F. Supp. at 557 (ability to effectively enforce their insurance laws is an important state interest). Moreover, this court finds that enjoining the state court proceedings is not authorized under *Bagget v. Department of Professional Regulation*, 717 F.2d 521, 524 (11th Cir. 1983). In *Bagget*, the court did not abstain because preemption was "readily apparent". Upon a review of the memoranda of law filed with this court and judging from the oral argument on the issue, at this stage of the proceedings preemption is a far cry from being "readily apparent".

courts of limited jurisdiction—is granted the power to determine its own jurisdiction, and once made, principles of res judicata operate to make the court's decision binding *unless reversed on appeal.*[5] *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinea,* 456 U.S. 694, 702 n.9, 102 S.Ct. 2099, 2104 n.9, 72 L.Ed.2d 492, 500 n.9 (1982) (no collateral attack because res judicata applies to subject matter determinations); *Chicot County Drainage District v. Baxter State Bank,* 308 U.S. 371, 376, 60 S.Ct. 317, 319, 84 L.Ed. 329 (1940), *Lambert v. Conrad,* 536 F.2d 1183, 1185 (7th Cir. 1976). There are exceptions to this general rule. *See Kalb v. Feuerstein,* 308 U.S. 433, 60 S.Ct. 343, 84 L.Ed. 370 (1940). Although the parties dispute whether this court can collaterally attack the state trial court judgment, the court will not resolve this issue because the court declines the invitation to issue a preliminary injunction based on the grounds given above.

Conclusion

Under the facts of this case this court concludes that the state courts have both the power and competency to resolve the *threshold* ERISA jurisdiction question presented. Plaintiffs' argument that ERISA preemption is so powerful that it displaces the authority of the state courts to decide the juris-

[5] Plaintiffs' failed to raise their ERISA jurisdiction issue in the state trial court proceeding. Even so, res judicata still applies. *Lambert,* 536 F.2d at 1185.

diction issue is not supported by law and flies in the face of principles of "federalism" and comity. Accordingly, it is hereby:

ORDERED and ADJUDGED that:

(1) plaintiffs' motion for preliminary injunction is DENIED.

(2) defendants' motion to dismiss plaintiffs' declaratory action is DEFERRED.

(3) all further proceedings in this court are STAYED PENDING RESOLUTION OF THE CASE BY THE STATE COURTS.

DONE and ORDERED in chambers in Miami, Florida, this 17th day of May, 1988.

/s/

UNITED STATES DISTRICT JUDGE

cc: all counsel of record.

APPENDIX C

BLUE CROSS AND BLUE SHIELD OF MARYLAND, INC.,

Plaintiff-Appellant

BLUE CROSS AND BLUE SHIELD OF FLORIDA, INC.,

Plaintiff-Intervenor,

v.

ROBERT WEINER, SR., MARGARET WEINER, MARK WEINER, and ROBERT WEINER, SR., as Personal Representative of the Estate of Steven Weiner,

Defendants-Appellees.

NO. 88-5518

United States Court of Appeals, Eleventh Circuit.

April 5, 1989.

Appeal from the United States District Court for the Southern District of Florida.

Before KRAVITCH and HATCHETT, Circuit Judges, and MARKEY *, Chief Circuit Judge.

HATCHETT, Circuit Judge.

Blue Cross and Blue Shield of Maryland, Inc. (BCBS-Maryland) appeals the district court's denial of its motion for preliminary injunction and the court's abstention from its claims for permanent injunctive and declaratory relief. We

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* Honorable Howard T. Markey, Chief U.S. Circuit Judge for the Federal Circuit, sitting by designation.

affirm the district court's denial of preliminary injunction and its decision on abstention, but remand to the district court with instructions that it dismiss the request for permanent injunction for lack of subject matter jurisdiction.

FACTS

BCBS-Maryland provides health insurance coverage for Robert Weiner and his dependents, Margaret Weiner, Stephen Weiner, and Mark Weiner. In the summer of 1982, Stephen Weiner became seriously ill and Mark Weiner suffered permanent injuries in an automobile accident. Stephen and Mark Weiner incurred substantial medical expenses. BCBS-Maryland provided coverage for these expenses until August 8, 1983, when it concluded that the insurance plan no longer covered their expenses.

In September, 1983, the Weiners filed suit against BCBS-Maryland and Blue Cross and Blue Shield of Florida (BCBS-Florida) in a Florida state court, alleging a breach of the duties of good faith and fair dealing, a breach of fiduciary duties, fraud, and a statutory violation. Responding to this action, BCBS-Maryland reinstated coverage in March, 1984, and paid all back claims to the Weiners. BCBS-Maryland has continued to pay all claims under the insurance policy since March, 1984.

In December, 1984, the Weiners amended the complaint to seek a declaration of their past, present, and future rights under the insurance contract. In addition, the amended complaint sought compensatory and punitive damages for breach of contract, breach of the duty of good faith, statutory violations, wrongful death, intentional infliction of emotional distress, and fraud. In December, 1985, the Weiners filed a second amended complaint alleging three tort claims: fraud, intentional infliction of mental distress, and negligence.

The case proceeded to trial on the tort claims. After find-

ing BCBS-Maryland liable for fraud, intentional infliction of mental distress, and negligence, the jury awarded the Weiners $500,000 in compensatory damages and $5,000,000 in punitive damages. The jury additionally found BCBS-Florida liable for fraud and intentional infliction of emotional distress. On these claims, the jury awarded the Weiners $200,000 in compensatory damages and $1.5 million in punitive damages. Based on the jury's liability determinations, the Florida court awarded the Weiners $1,411,600 in attorney's fees.

After the Florida court entered its judgment for the Weiners, the United States Supreme Court decided two cases which hold that the Employee Retirement Income Security Act (ERISA) preempts state common law claims alleging an improper processing of employee benefit plan claims. *Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. 41, 107 S.Ct. 1549, 95 L.Ed.2d 39 (1987); *Metropolitan Life Ins. Co. v. Taylor,* 481 U.S. 58, 107 S.Ct. 1542, 95 L.Ed.2d 55 (1987). Arguing primarily that ERISA preempted the Florida causes of action, BCBS-Maryland and BCBS-Florida appealed the judgment and attorney's fees award in a Florida appellate court. The Florida appellate court heard oral argument on May 3, 1988, but has not rendered a decision.

PROCEDURAL HISTORY

On April 14, 1988, relying on *Pilot Life* and *Metropolitan Life,* BCBS-Maryland filed suit in the Southern District of Florida to enjoin the Weiners from further appealing or enforcing the Florida court's judgment and attorney's fees award. In addition, BCBS-Maryland requested that the district court declare the judgment void and unenforceable. BCBS-Florida intervened seeking the same relief. The Weiners moved the district court to dismiss BCBS-Maryland's and BCBS-Florida's complaint, or alternatively, to abstain from interfering with the state court proceedings.

The district court denied the preliminary injunction. The court concluded that BCBS-Maryland and BCBS-Florida did not demonstrate any irreparable harm because the Florida appellate court could decide the preemption issue. Furthermore, the district court found that a preliminary injunction would not serve the public interest, but rather would harm the public interest because interfering with the state court proceedings would disregard the principles of federalism and comity.

The district court deferred decision on the declaratory relief claims, staying all federal proceedings pending the Florida courts' resolution of the preemption issue. The district court abstained after concluding as follows: BCBS-Maryland's injunctive relief would enjoin ongoing state proceedings, BCBS-Maryland could present its federal claims in the Florida appellate court, and the Florida court's proceedings involved important state interests. See *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971) (federal courts should generally refrain from enjoining pending state proceedings); *Browning Corp. Int'l. v. Lee*, 624 F. Supp. 555, 557 (N.D.Tex.1986) (state courts must have ability to determine if ERISA governs particular employee benefit plan to effectively enforce state insurance laws).

CONTENTIONS

BCBS-Maryland contends that the district court abused its discretion in denying the preliminary injunction because it satisfied the four elements for obtaining a preliminary injunction: (1) BCBS-Maryland demonstrated a substantial probability of prevailing because ERISA preempts the Weiners' common law tort claims, and the Florida trial court lacked jurisdiction over the ERISA claims; (2) the denial will cause BCBS-Maryland irreparable harm because it will lose its right to have a federal court decide the preemption issue; (3) BCBS-Maryland's threatened harm outweighs the Weiners' harm because the Weiners will not incur any injury; and (4) the preliminary injunction would serve the

public interest by promoting a national uniform interpretation of ERISA.

Turning to the permanent injunction and declaratory relief, BCBS-Maryland contends that the district court improperly abstained because this case does not involve a sufficiently vital state interest to warrant abstention. Furthermore, BCBS-Maryland contends that it properly collaterally attacked the Florida court's decision.

The Weiners contend that the district court must dismiss the action because BCBS-Maryland cannot collaterally attack the Florida court's judgment for two reasons: (1) the district court lacks subject matter jurisdiction under the *Rooker-Feldman* doctrine, and (2) *res judicata* precludes the district court from deciding the preemption issue. Alternatively, the Weiners contend that the district court properly denied the preliminary injunction because BCBS-Maryland failed to establish any of the four requirements for a preliminary injunction.

The Weiners further contend that the district court properly abstained from granting the requested permanent injunctive and declaratory relief. According to the Weiners, BCBS-Maryland's attempt to enjoin the enforcement of the Florida court's judgment and attorney's fees award implicates vital state interests.

ISSUES

The parties raise the following issues on appeal: (1) whether the district court lacked subject matter jurisdiction because BCBS-Maryland's claims require the district court to exercise appellate jurisdiction over the state court proceedings; (2) whether *res judicata* precludes BCBS-Maryland from collaterally attacking the state court judgment; (3) whether the district court improperly abstained from granting declaratory relief; and (4) whether the district court abused its discretion in denying the preliminary injunction.

DISCUSSION

The Weiners challenge the district court's subject matter jurisdiction over BCBS-Maryland's federal claims. The Weiners contend that the district court's decision necessarily entails reviewing the Florida trial court's judgment in violation of Supreme Court authority expressly prohibiting district courts from exercising such appellate review. We agree.**

I. The Rooker-Feldman Doctrine

[1] The Supreme Court first prohibited a district court from reviewing a state court decision for alleged federal law errors in *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923). In *Rooker*, after the action proceeded through the Indiana courts, the unsuccessful party filed suit in federal district court arguing that the state courts relied on an unconstitutional statute. The Supreme Court held that the district court did not have jurisdiction to correct the alleged constitutional error in the Indiana Supreme Court's decision. *Rooker*, 263 U.S. at 415, 44 S.Ct. at 150. The Court found such review improper for two reasons: (1) district courts can only exercise original jurisdiction, and (2) the Supreme Court has the exclusive authority to review state supreme court decisions for alleged federal law errors. *Rooker*, 263 U.S. at 416, 44 S.Ct. at 150; *see* 28 U.S.C.A. §§1257, 1331 (West 1966 & Supp. 1988).

Sixty years later, the Supreme Court reaffirmed the *Rooker* holding in *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983). The District of Columbia Court of Appeals denied Feldman's petition for admission to the District of Columbia Bar, refusing to waive the District of Columbia rule that required individuals to graduate from an American Bar Association accredited law school. Feldman filed suit in dis-

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**Because this issue disposes of this action, we do not address the other issues.

trict court, seeking a declaration that the District of Columbia Court of Appeals's [sic] refusal to admit him to the bar violated the fifth amendment and the Sherman Act. In addition, Feldman sought injunctive relief either requiring immediate admission to the District of Columbia Bar or allowing him to sit for the bar examination. The Supreme Court concluded that the district court lacked jurisdiction to hear Feldman's fifth amendment and federal antitrust challenges to the District of Columbia Court of Appeals's [sic] denial of his petition. *Feldman*, 460 U.S. at 486, 103 S.Ct. at 1316, 75 L.Ed.2d at 225. Citing *Rooker*, the Court held that the district court could not decide these federal issues because they were "inextricably intertwined" with the District of Columbia Court of Appeals's [sic] decision. *Feldman*, 460 U.S. at 486-87, 103 S.Ct. at 1316-17, 75 L.Ed.2d at 225.

In contrast, the Supreme Court held that the district court properly exercised jurisdiction over Feldman's general constitutional challenge to the accreditation rule because reviewing such an attack would not amount to reviewing the District of Columbia Court of Appeals's [sic] decision. 460 U.S. at 487, 103 S.Ct. at 1316-17, 75 L.Ed.2d at 225-26. Thus, although federal district courts have jurisdiction over general constitutional challenges, *Rooker* and *Feldman* prohibit such courts from exercising jurisdiction to decide federal issues that are inextricably intertwined with a state court's judgment.

II. Application of the Rooker-Feldman Doctrine

BCBS-Maryland contends that the *Rooker-Feldman* doctrine does not apply to this action because it has merely asserted a non-constitutional challenge, the Florida trial court did not address the preemption issue, and the preemption issue is not inextricably intertwined with the Florida court's judgment. Contrary to BCBS-Maryland's arguments, we find that the *Rooker-Feldman* doctrine compels the district court to dismiss this action for lack of jurisdiction.

A. Non-Constitutional Challenges

[2] BCBS-Maryland argues that the *Rooker-Feldman* doc-

trine does not apply because it has asserted a non-constitutional challenge to the Florida trial court's judgment. We disagree. Neither the Supreme Court [sic] not this court has limited the *Rooker-Feldman* bar to constitutional claims. In *Feldman*, the Court held that the district court lacked subject matter jurisdiction over Feldman's fifth amendment and Sherman Act challenges. The *Feldman* Court never distinguished between the constitutional and non-constitutional federal claims. *Feldman*, 460 U.S. at 464, 103 S.Ct. at 1305, 75 L.Ed.2d at 225 ("[district courts] do not have jurisdiction, however, over challenges to state-court decisions in particular cases arising out of judicial proceedings even if those challenges allege that the state court's action was unconstitutional.").

This court has similarly applied the *Rooker-Feldman* bar to non-constitutional federal claims. *See, e.g., Staley v. Ledbetter*, 837 F.2d 1016 (11th Cir. 1988). Staley sought to regain custody of her adopted child in the Georgia court system. The Georgia juvenile court and the Georgia Court of Appeals affirmed the termination. After the Georgia Supreme Court denied Staley's writ of certiorari, Staley brought a section 1983 action claiming violations of her equal protection and due process rights, and her statutory rights under the Child Welfare Act of 1980. We affirmed the district court's dismissal for lack of jurisdiction of all of Staley's claims, including the non-constitutional federal claim. In reaching this conclusion, the court stated, "[a federal district court] may not decide *federal issues* that are raised in state proceedings and 'inextricably intertwined' with the state court's judgment." *Staley*, 837 F.2d at 1018 (emphasis added) (quoting *Wood v. Orange County*, 715 F.2d 1543, 1546 (11th Cir. 1983), *cert. denied*, 467 U.S. 1210, 104 S.Ct. 2398, 81 L.Ed.2d 355 (1984)); *see also Berman v. Florida Board of Bar Examiners*, 794 F.2d 1529, 1530 (11th Cir. 1986) (affirming district court's dismissal of federal plaintiff's claims and stating that district courts lacked jurisdiction over challenges "based on *constitutional or other grounds* [to] a state court's judicial decision in a particular

case . . . den[ying] . . . admission to a particular bar applicant." (Emphasis added)). Therefore, the *Rooker-Feldman* bar applies even though BCBS-Maryland only raises non-constitutional federal claims to attack the Florida proceedings.

B. Issue Not Raised in Trial Court

[3] BCBS-Maryland also contends that the *Rooker-Feldman* doctrine does not apply because the federal court will only address the preemption question, an issue which the Florida trial court did not decide. The Weiners concede that the Florida trial court did not decide the preemption issue. The Weiners argue, however, that the *Rooker-Feldman* bar applies because BCBS-Maryland had a reasonable opportunity to raise, and did raise, the preemption issue to the Florida appellate court.

Supreme Court and Eleventh Circuit authority refutes BCBS-Maryland's asserted limitation. In *Feldman*, the Supreme Court noted that a district court could not exercise jurisdiction over constitutional claims inextricably intertwined with a state court's judgment simply because the federal plaintiff failed to raise such claim in the state court. *Feldman*, 460 U.S. at 482 n.16, 103 S.Ct. at 1315 n.16, 75 L.Ed.2d at 223 n.16. Interpreting this broad proposition, this court concluded that the *Rooker-Feldman* doctrine applies when the federal plaintiff had a reasonable opportunity to raise the federal claim in the state court proceedings. *Wood*, 715 F.2d at 1546-47.

The problem then becomes determining the scope of the term "reasonable opportunity." This court has rendered several relevant decisions. In *Wood*, the court indicated that a party's ability to raise a claim on appeal constituted a reasonable opportunity to raise the claim. *Wood*, 715 F.2d at 1548 (district court had jurisdiction only because the federal plaintiff did not have a reasonable opportunity to raise his claim; he lacked a reasonable opportunity to appeal the judgment, and the opportunity for a post-judgment attack did not substitute for an appeal). More importantly, in a

nearly identical case to the present action, this court affirmed the district court's dismissal for lack of jurisdiction because the party had the opportunity, and in fact availed himself of such opportunity, to raise his federal claims in his state court appeal of a state trial court's decision. *Rolleston v. Eldridge*, 848 F.2d 163, 165 (11th Cir. 1988); *see also Hollins v. Wessel*, 819 F.2d 1073, 1074 (11th Cir. 1987) (district court lacked jurisdiction where federal plaintiff appealed state trial court's decision because such plaintiff had the opportunity to raise his federal claims).

As in *Rolleston* and *Hollins*, BCBS-Maryland had the opportunity to assert, and did assert, the preemption issue in its state court appeal. Because the Florida appellate court is an appropriate forum for determining whether the state trial court had jurisdiction, the *Rooker-Feldman* bar applies to BCBS-Maryland's preemption claim. See *Key v. Wise*, 629 F.2d 1049, 1055 (5th Cir. 1980), *cert. denied*, 454 U.S. 1103, 102 S.Ct. 682, 70 L.Ed.2d 647 (1981) (lower federal court lacks power to vacate Mississippi Supreme Court's decision approving jurisdiction of Mississippi trial court).

C. Inextricably Intertwined

[4] BCBS-Maryland finally contends that the district court had jurisdiction because the preemption issue is not "inextricably intertwined" with the Florida trail [sic] court's judgment.

BCBS-Maryland's preemption claim would require the district court to decide whether ERISA preempted the Weiners' tort claims. The district court would not merely decide the general issue of whether ERISA preempts all state tort claims. Rather, the district court would have to determine whether ERISA preempts the tort claims *in this case* by determining whether ERISA governs the Weiners' insurance plans. As the Weiners note, the Florida trial court litigated the factual issues upon which BCBS-Maryland's claim of ERISA preemption depends, including the nature of the Weiners' insurance policy, the circumstances under which the Weiners purchased it, and the relationship between their

tort claims and the administration of benefits under the policy. Thus, the district court would necessarily review these essential components of the Florida trial court's judgment. Such review exemplifies the zone of appellate review from which federal district courts are forbidden.

D. Applicable to Injunctive and Declaratory Relief

[5] Finally, we note that the *Rooker-Feldman* bar applies to BCBS-Maryland's request for injunctive relief in addition to its request for declaratory relief. Both the Supreme Court and this court have dismissed injunctive relief claims under the *Rooker-Feldman* doctrine. *See Feldman*, 460 U.S. at 468, 103 S.Ct. at 1307, 75 L.Ed.2d at 214; *Hollins*, 819 F.2d at 1074; *Wood*, 715 F.2d at 1545. We emphasize this point because a prior binding decision held that *Rooker* did not apply to requests to enjoin state court proceedings. *Gresham Park Comm. Organ. v. Howell*, 652 F.2d 1227, 1236 (5th Cir. Unit B 1981). Relying on *Feldman*, however, this court expressly abandoned *Gresham's* restrictive interpretation of *Rooker*. *Wood*, 715 F.2d at 1546.

CONCLUSION

Because BCBS-Maryland's requested relief would require the district court to decide a federal issue inextricably intertwined with the Florida trial court's judgment, the district court lacked subject matter jurisdiction. Consequently, we affirm the district court's denial of the preliminary injunction and its order of abstention, but remand this case to the district court with instructions to dismiss the action as it relates to the request for permanent injunction for lack of subject matter jurisdiction.

AFFIRMED AND REMANDED WITH DIRECTIONS

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 88-5518

BLUE CROSS AND BLUE SHIELD
OF MARYLAND, INC.,

Plaintiff-Appellant,

BLUE CROSS AND BLUE SHIELD
OF FLORIDA, INC.,

Plaintiff-Intervenor,

versus

ROBERT WEINER, SR.,
MARGARET WEINER, MARK WEINER,
and ROBERT WEINER, SR., as Personal
Representatives of the Estate of
Steven Weiner,
Defendants-Appellees.

Appeal from the United States District Court for the
Southern District of Florida

**ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING IN BANC**

(Opinion April 5, 1989, 11 Cir., 198 __, ____ F.2d ____).
( )

Before KRAVITCH and HATCHETT, Circuit Judges, and MARKEY*, Chief Circuit Judge.

PER CURIAM:

(**X**) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause in banc, and a majority of the judges in active service not having voted in favor of it, Rehearing In Banc is DENIED.

ENTERED FOR THE COURT:

/s/

United States Circuit Judge

ORD-42

*Honorable Howard T. Markey, Chief U.S. Circuit Judge for the Federal Circuit, sitting by designation.

APPENDIX E

IN THE CIRCUIT COURT OF THE
17TH JUDICIAL CIRCUIT IN AND
FOR BROWARD COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO.: 84-00840 CH

ROBERT WEINER, MARGARET WEINER,
MARK WEINER, and ROBERT WEINER
as Personal Representative of
the Estate of STEVEN WEINER,

Plaintiffs,

vs.

BLUE CROSS OF MARYLAND, INC.,
BLUE SHIELD OF MARYLAND, INC.,
BLUE CROSS and BLUE SHIELD OF
MARYLAND, INC. and BLUE CROSS/
BLUE SHIELD OF FLORIDA, INC.,

Defendants

FINAL JUDGMENT

THIS CAUSE came on to be heard before the Honorable Robert L. Andrews, one of the Judges of the above-styled Court, and a jury of six true and lawful men and women, who, having been first duly sworn according to law, and having heard the evidence, the arguments of counsel and the charges of the Court, and having retired to consider their verdict, returned in open Court the following verdict, to-wit:

We, the jury, return the following verdict:

1. Did Blue Cross/Blue Shield of Maryland misrepresent the coverage available under its group health plan for Mark or Steven Weiner, which was a legal

cause of injury to the plaintiffs?

YES X NO ___

2. Did Blue Cross/Blue Shield of Florida misrepresent the need for or terms of continuing coverage for Mark Weiner, which was a legal cause of injury to the plaintiffs?

YES X NO ___

3. Were there intentional or reckless actions of either Blue Cross/Blue Shield of Maryland or Blue Cross/Blue Shield of Florida that caused severe emotional distress to the plaintiffs?

As to Blue Cross/Blue Shield of Maryland:
YES X NO ___

As to Blue Cross/Blue Shield of Florida:
YES X NO ___

4. Was there negligence on the part of either Blue Cross/Blue Shield of Maryland or Blue Cross/ Blue Shield of Florida in the administration of the group health plan which was a legal cause of damage to the plaintiffs?

As to Blue Cross/Blue Shield of Maryland:
YES X NO ___

As to Blue Cross/Blue Shield of Florida:
YES ___ NO X

[If you have answered NO to questions l, 2, 3 and 4, your verdict is for the defendants and you should not proceed further except to date and sign this verdict form and return it to the courtroom. If., however, your answer to any part of any one or more of questions 1, 2, 3 or 4 is YES, you should proceed to answer question 5.

5. What is the total amount (100%) of the injury or damages sustained by each of the plaintiffs by virtue

of the defendant and/or defendants' acts?

	As to Blue Cross/Blue Shield of Maryland	As to Blue Cross/Blue Shield of Florida
Robert Weiner	$100,000.00	$50,000.00
Margaret Weiner	$100,000.00	$50,000.00
Mark Weiner	$150,000.00	$50,000.00
Estate of Steven Weiner	$150,000.00	$50,000.00

[If your answer to any part of any one or more of questions 1, 2 or 3 is YES, you should also proceed to answer question 6.]

6. As punitive damages against the defendants, the jury assesses the following sums:

Blue Cross/Blue Shield of Maryland	$5,000,000.00
Blue Cross/Blue Shield of Florida	$1,500,000.00

SO SAY WE ALL this 25th day of September, 1986.

/s/ Willie Woods
Foreperson

it is therefore

ORDERED AND ADJUDGED that Final Judgment be and it it [sic] hereby entered in this cause in favor of the plaintiffs and against the defendants, and the plaintiff, Robert Weiner, shall have and recover from the defendant, Blue Cross/Blue Shield of Maryland, the sum of One Hundred Thousand Dollars ($100,000.00) and from the defendant, Blue Cross/Blue Shield of Florida, the sum of Fifty Thousand Dollars ($50,000.00), lawful money of the United States of America; the plaintiff, Margaret Weiner, shall have and recover from the defendant, Blue Cross/Blue Shield of Maryland, the sum of One Hundred Thousand Dollars

($100,000.00) and from the defendant, Blue Cross/Blue Shield of Florida, the sum of Fifty Thousand Dollars ($50,000.00), lawful money of the United States of America; the plaintiff, Mark Weiner, shall have and recover from the defendant, Blue Cross/Blue Shield of Maryland, the sum of One Hundred Fifty Thousand Dollars ($150,000.00) and from the defendant, Blue Cross/Blue Shield of Florida, the sum of Fifty Thousand Dollars ($50,000.00), lawful money of the United States of America; the plaintiff, the Estate of Steven Weiner, shall have and recover from the defendant, Blue Cross/Blue Shield of Maryland, the sum of One Hundred Fifty Thousand Dollars ($150,000.00) and from the defendant, Blue Cross/Blue Shield of Florida, the sum of Fifty Thousand Dollars ($50,000.00), lawful money of the United States of America; and the plaintiffs shall recover as punitive damages from the defendant, Blue Cross/Blue Shield of Maryland, the sum of Five Million Dollars ($5,000,000.00) and as punitive damages from the defendant, Blue Cross/Blue Shield of Florida, the sum of One Million, Five Hundred Thousand Dollars ($1,500,000.00), lawful money of the United States of America; and FOR WHICH LET EXECUTION ISSUE.

IT IS FURTHER ORDERED AND ADJUDGED that the Court shall retain jurisdiction of this cause and the parties thereto for determination of the question of taxation of costs and attorneys fees.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 26th day of September, 1986.

/s/

CIRCUIT COURT JUDGE

Copies furnished to:
Stewart Tilghman Fox & Bianchi, P.A.
Esler & Kirschbaum
Walton Lantaff Schroeder & Carson
Podhurst Orseck Parks Josefsberg
Eaton Meadow & Olin

APPENDIX F

IN THE CIRCUIT COURT OF THE
17TH JUDICIAL CIRCUIT IN AND
FOR BROWARD COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO.: 84-00840 CH

ROBERT WEINER, MARGARET WEINER,
MARK WEINER, and ROBERT WEINER
as Personal Representative of
the Estate of STEVEN WEINER,

Plaintiffs,

vs.

BLUE CROSS OF MARYLAND, INC.,
BLUE SHIELD OF MARYLAND, INC.,
BLUE CROSS and BLUE SHIELD OF
MARYLAND, INC. and BLUE CROSS/
BLUE SHIELD OF FLORIDA, INC.,

Defendants.

ORDER ON PLAINTIFFS' MOTION FOR ATTORNEYS' FEES AND JUDGMENT THEREON

THIS CAUSE coming on before the Court on November 20, 1986, on the Plaintiffs' Motion for Attorneys Fees and the Court having conducted a hearing and considered the testimony and evidence presented at such hearing, and the Court being fully advised in the premises, hereby makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. The Court finds that the matters of coverage, interpretation of the insurance policies involved and the policy claims of the defendants were the mainstay of contention

and the central core of the trial of this case and of much of the discovery and pretrial proceedings that preceded the trial. The Court has carefully examined the time itemizations submitted on behalf of plaintiffs' counsel and has specifically excluded time involved in travel as well as time that the Court has found to be duplicative. The Court has also specifically excluded over 500 hours of paralegal time in accordance with the holding in *Rivers Trailers, Inc. v. Miller*, 489 So.2d 1139 (Fla. 1st DCA 1986).

Taking all of the foregoing into account, the Court finds that the reasonable amount of hours expended by plaintiffs' counsel in this case with respect to the matters of coverage, interpretation of the insurance policies involved and the policy claims of the defendants is as follows:

Colson, Hicks & Ridson	158.5
Larry S. Stewart	800.0
David W. Bianchi	900.0

In arriving at these figures, the Court has considered the fact that the insurance benefits resulting to the plaintiffs by reason of this action, may well exceed several million dollars. At the time that the defendants began to process plaintiffs bills in March, 1984, there was outstanding approximately $150,000 in unpaid medical bills. During the progress of the litigation, the defendants asserted that the entire coverage was void by reason of plaintiffs' misrepresentation and that alternatively certain services were not covered benefits. The insurance coverage consists of three policies: physician services coverage in an unlimited amount, hospital services coverage in an unlimited amount and major medical coverage with a primary limit of $1,000,000 per person. The plaintiff, Mark Weiner, is a quadriplegic and will undoubtedly require medical care in excess of $1,000,000. The plaintiffs, Robert and Margaret Weiner, have in the past and most probably will in the future require medical care.

The Court also notes that while these amounts of time in the abstract appear large, the Court finds that a great deal

of this time was necessitated by the defendants' conduct in pursuing obstructionist discovery tactics, asserting non-meritorious policy positions and a non-meritorious affirmative defense all of which resulted in extensive discovery which would otherwise have been unnecessary. Consistent with the purpose of Chapter 627.428, Florida Statutes, to discourage contesting of insurance matters, the Court finds that all of such time expended by plaintiffs' counsel in dealing with those matters should be included in arriving at a reasonable fee. The Court also notes with respect to the reasonableness of the time involved by plaintiffs' counsel, that the defense attorneys in this case cumulatively spent in excess of 2800 hours. Although that time included all issues, it strongly buttresses the reasonableness of plaintiffs' counsels' time on the insurance issues.

2. In arriving at a reasonable hourly rate, the Court has taken into account the skill and expertise of the counsel involved as well as the testimony of the expert witnesses. The Court finds that a reasonable hourly rate for Larry S. Stewart is $350 per hour; that a reasonable hourly rate for David W. Bianchi is $200 per hour; and that a reasonable hourly rate for the time of the firm of Colson, Hicks & Ridson, which consists primarily of the services of Dean Colson, is $200 per hour.

3. Based on the foregoing the Court determines that the lodestar for Larry S. Stewart is Two hundred eighty thousand Dollars ($280,000.00); that the lodestar for David W. Bianchi is One hundred eighty thousand Dollars ($180,000.00); and that the lodestar for Colson, Hicks & Ridson is Thirty-one thousand, six hundred Dollars ($31,600.00).

4. In consideration of the expert witness testimony and the Court's own personal observation of the trial of this cause, the Court finds that there should be an upward enhancement based upon the "contingency risk factor" delineated in *Florida Patients Compensation Fund v. Rowe*, 472 So.2d 1145 (Fla. 1985). Based on the Court's observa-

tions of the file, pretrial hearings and the trial itself, the Court finds that the likelihood of success at the time the case was initiated was unlikely. From the very outset, up to the trial itself, the defendants took the position of stonewalling, of delaying and going into collateral matters to divert the search for the truth. In the hands of lesser counsel there would in all probability have been no success at all. The unlikelihood of success is also borne out in part by the fact that Blue Cross/Blue Shield of Maryland never made any offer of settlement and Blue Cross/Blue Shield of Florida stated it would consider only a minimal offer of settlement before trial. Based on the foregoing, the Court finds that as to the services performed by Larry S. Stewart and David W. Bianchi, the lodestar should be enhanced by a multiplier of 3.0. As to the services of Colson, Hicks & Ridson, the Court does not find a multiplier to be applicable.

5. Multiplying the lodestar figure for the services of Larry S. Stewart and David W. Bianchi by 3.0 and including the lodestar for Colson, Hicks & Ridson, the Court determines the reasonable attorneys' fee in this case to be One Million, Four Hundred Eleven Thousand, Six Hundred Dollars ($1,411,600.00).

CONCLUSIONS OF LAW

Based upon the foregoing, it is hereby

ORDERED AND ADJUDGED that the Plaintiffs [sic] Motion for Attorneys Fees be and the same hereby is granted and attorneys fees are hereby awarded to the plaintiffs in the sum of One Million, Four Hundred Eleven Thousand, Six Hundred Dollars ($1,411,600.00).

JUDGMENT ON ATTORNEYS FEES

It is hereby ORDERED AND ADJUDGED that a judgment of attorneys fees be entered in favor of the Plaintiffs, Robert Weiner, Margaret Weiner, Mark Weiner, and Robert Weiner as Personal Representative of the Estate of Steven Weiner, and against the Defendants, Blue Cross of Mary-

land, Inc., Blue Shield of Maryland, Inc., Blue Cross and Blue Shield of Maryland, Inc. and Blue Cross/Blue Shield of Florida, Inc., and the Plaintiffs shall have and recover as attorneys fees from said Defendants the sum of One Million, Four Hundred Eleven Thousand, Six Hundred Dollars ($1,411,600.00), lawful money of the United States of America, and for which let execution issue.

DONE AND ORDERED in Chambers Fort Lauderdale, Broward County, Florida this 24th day of November, 1986.

/s/

CIRCUIT COURT JUDGE

Copies furnished to:

Mr. Carl E. Jenkins
WALTON LANTAFF SCHROEDER & CARSON
Robert C. Josefsberg
PODHURST ORSECK PARKS JOSEFSBERG
EATON MEADOW & OLIN, P.A.
Joel L. Kirschbaum
ESLER & KIRSCHBAUM, P.A.
Larry S. Stewart
STEWART TILGHMAN FOX & BIANCHI, P.A.

APPENDIX F (cont'd)

IN THE CIRCUIT COURT OF
THE 17TH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY,
FLORIDA

GENERAL JURISDICTION
DIVISION

CASE NO.: 84-00840 CH

ROBERT WEINER, MARGARET WEINER,
MARK WEINER, and ROBERT WEINER
as personal representative of
the estate of STEVEN WEINER,

Plaintiffs,

vs.

BLUE CROSS OF MARYLAND, INC.,
BLUE SHIELD OF MARYLAND, INC.,
BLUE CROSS and BLUE SHIELD OF
MARYLAND, INC.

Defendants.

ORDER ON PLAINTIFFS' MOTION FOR ATTORNEYS FEES BY REMAND FROM THE 4TH DISTRICT COURT OF APPEAL

THIS CAUSE is before the Court on remand from the 4th District Court of Appeal, following an appeal by the Defendants, regarding an award of attorney fees in favor of the Plaintiff. In that appeal, the Court reversed the judgement of attorney fees against Florida, and remanded so that this Court may reapportion attorney fees as to Maryland alone.

FINDINGS OF FACT

The facts of this case are as follows. In March of 1982, Mr. Weiner purchased health insurance for himself and his family. That policy was sponsored by Blue Cross/Blue Shield of Maryland (Maryland). Blue Cross/Blue Shield of Florida (Florida) was at all times Maryland's agent for the purpose of servicing claims arising in this state.[1] Tragically, in August [19]82, Mark Weiner was involved in an accident and became a quadriplegic. That same summer Steven Weiner was diagnosed with a fatal illness. As the insurance coverage called for, Maryland began making payments for hospitalization and nursing care. In August of 1983, Mr. Weiner was informed that all coverage was being terminated. When negotiations to reinstate coverage proved fruitless, a suit was instituted in which Mr. Weiner prevailed against both Defendants. This Court, on plaintiff's motion, then awarded the Weiners attorney's fees as called for by Florida Statute 627.428.[2] Florida appealed to the 4th District Court of Appeal which reversed both the judgment and the award of attorney's fees as to Florida but affirmed the judgment as to Maryland. It is now this Court's responsibility to consider the issue of reapportionment of the award of attorney's fees as to Maryland alone.

The issues surrounding attorney fees have seen ample exposure in this State. It is well settled in Florida that attorney's fees may only be awarded by contract, when an attor-

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[1] The 4th District Court of Appeal itself expressly noted that Florida was Maryland's agent.

[2] Florida Statute 627.428 Attorney's Fees

(1) Upon the rendition of a judgment of decree by any of the courts of this state against an insured and in favor of any named or omnibus insured . . . the trial court or, in the event of an appeal in which the insured or beneficiary prevails, the appellate court shall adjudge or decree against the insurer and in favor of the insured or beneficiary a reasonable sum as fees or compensation for the insured's or beneficiary's attorney prosecuting the suit in which recovery is had.

ney creates or brings a special fund into the court, or as in this case, by statute. *McElhiney v. Ash Properties, Inc.*, 411 So.2d 291 (Fla. lst Dist. Ct. App. 1982), *City of Miami Beach v. Town of Bay Harbor Islands*, 380 So.2d 1112 (Fla. 3rd Dist. Ct. App. 1980). The remedy stated in Florida Statute 627.428 has existed in some form or another for many years. The aim of this statute, and the underlying public policy is to dissuade insurers from contesting insurance coverage, especially when the insureds, such as the plaintiffs, are in such dire straits. *Feller v. Equitable Life Assurance Soc.*, 57 So.2d 581,586 (Fla. 1952) (en banc), *Florida Rock and Tank Lines, Inc. v. Continental Insurance Co.*, 399 So.2d 122,124 (Fla. lst Dist. Ct. App. 1981). In cases such as these, the statutory provisions awarding attorney's fees is in the nature of a penalty, and must be strictly construed by the court. *Wilmington Trust Co. v. Manufacturers Life Insurance*, 749 F.2d 694, 700 (11th Cir. 1985), *Travelers Indemnity Co. v. Chisholm*, 384 So.2d 1360 (Fla. 2d Dist. Ct. App. 1980), *American National Insurance Co. v. de Cardenas*, 181 So.2d 359, 361 (Fla. 3rd Dist. Ct. App. 1965).

It is Maryland's position that time expended by Plaintiff's attorneys in relation to Florida should not be assessed against them. To support this position Maryland cites *Vulcan Socieity [sic] of Westchester Cty. v. Fire Department*, 533 F. Supp. 1054 (S.D.N.Y. 1982). That case states that when certain aspects of litigation are attributable solely to one or more defendants, that fairness requires those matters to be identified, and divided among *only responsible* defendants. *Id at 1064*. What the Defendants overlook is that they and not Florida were solely responsible for the Plaintiff's insurance coverage being canceled. It was for this exact reason that the Court of Appeal reversed the judgement as to Florida. It is also for this reason that attorney fees accumulated by the plaintiffs concerning their insurance coverage should be paid by Maryland.

Strictly construing the language of Florida Statute 627.428 gives guidance to the Court in awarding a prevail-

ing insured attorney's fees in a suit involving coverage issues. The statute does not call for apportionment of attorneys fees between two insurers who caused a suit regarding coverage to be instituted. The Statute does however impliedly call for the apportionment of attorneys fees when there are other claims in a suit besides the interpretation of the policy and the determination of coverage, but that is not the case here. In this case, the issues involved fall squarely within the scope and public policy of Florida Statute 627.428.

Maryland also cites *Nash v. Chandler*, 848 F.2d 567 (5th Cir. 1988) for the proposition that fees expended for unsuccessful claims should be segregated from the fee award against Maryland. However, the Court in *Nash* ultimately found that "[t]he unsuccessful claims were not so distinct from the successful claims as to be severed for the purpose of awarding attorney fees". *Id at 572*. In the present case, the claims presented against both Defendants were identical, and all arose from the insurance coverage sponsored by Maryland. Had the claims against the Defendants been separate and distinct then the fee award would properly be divided among those claims, but this is not the case.

Both the Trial Court and Court of Appeal held that matters of coverage and interpretation of the insurance policy were the "central core" of the trial. The United States Supreme Court with reference to a civil rights case has held that:

> [i]n some cases a plaintiff may present in one lawsuit distinctly different claims for relief that are based on different facts and legal theories. In such a suit, even where the claims are brought against the same defendants . . . counsel's work on one claim will be unrelated to his work on another claim. Accordingly, work on an unsuccessful claim cannot be deemed to have been "expended in pursuit of the ultimate result achieved" . . . It may well be that cases involving such unrelated claims are unlikely to arise with great frequency. . . . In other cases the plaintiff's claims for

> relief will involve a common core of facts or will be based on related legal theories. Much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. Such a lawsuit cannot be viewed as a series of discrete claims. Instead the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation."

Hensley v. Eckerhart, 103 S.Ct. 1933, 1940, 461 U.S. 424, 435 (1983).

The theories above are aptly summarized in *Chrysler Corp. v. Weinstein*, 522 So.2d 895 (Fla. 3rd Dist. Ct. App. 1988). That case as in the instant one had two defendants and one plaintiff. In *Weinstein* the Appellate Court states "[W]hen claims arose from the same common core of facts the apportionment between claims is not necessary". The Court in *Weinstein* felt that if separate and distinct causes of actions are present rather than alternative theories of liability, apportionment would be appropriate. In this case, every cause of action raised against Maryland was properly raised against Florida. This was due to the tactics of the Defendants in both the initial discovery and pretrial proceedings.[3] It was not until after formal proceedings began that this Court could have concluded that Florida was merely acting as an agent for the benefit of Maryland. It is for reasons such as these that the judgment of attorney fees should be assessed against Maryland alone.

The other cases cited by Maryland are also inapplicable since they involve apportionment between several defen-

---

[3] The tactics used by Maryland and Florida resulted in liability for the infliction of emotional distress. Florida was relieved from liability by the 4th District Court of Appeal because the Court found that as an agent, Florida only relayed the decisions of its principle (Maryland). The judgement against Maryland along with liability for fraud is now final.

dants and isolated causes of action not all of which allow the prevailing party attorneys fees.

It is Maryland's contention that this court reconsider the entire issue of attorney's fees as if the previous proceedings never occurred. This view however is inconsistent with Florida case law, and would serve only to further tax an already overworked judicial system. This Court has already conducted hearings, considered testimony, and examined evidence concerning the award of attorneys fees, as required by *Florida Patient's Compensation Fund v. Rowe,* 472 So.2d 1145 (Fla. 1985). This Court has also considered those factors set forth in *Rowe* and in its discretion, found that the circumstances made the $1,411,600.00 assessment of attorneys fees reasonable. In addition, the amount of the assessment was not found to be unreasonable, and has been upheld.

CONCLUSIONS OF LAW

For the reasoning demonstrated above the Plaintiffs Motion for Attorneys Fees is hereby granted against Maryland alone.

JUDGEMENT ON ATTORNEY FEES

It is hereby ORDERED AND ADJUDGED that a judgement of attorneys fees be entered in favor of the Plaintiffs Robert Weiner, Margaret Weiner, Mark Weiner, and Robert Weiner as Personal Representative of the Estate of Steven Weiner, against BLUE CROSS OF MARYLAND, INC., BLUE SHIELD OF MARYLAND, INC., BLUE CROSS and BLUE SHIELD OF MARYLAND, INC., and the Plaintiffs shall have and recover as attorneys fees from said Defendant the sum of One Million, Four Hundred Eleven Thousand, and Six Hundred Dollars ($1,411,600.00), lawful money of the United States of America, and for which let execution issue.

DONE AND ORDERED in Chambers Fort Lauderdale, Broward County, Florida this 31st day of July 1989.

/s/
CIRCUIT COURT JUDGE

Copies Furnished to:

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APPENDIX G

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FOURTH DISTRICT
JANUARY TERM 1989

BLUE CROSS/BLUE SHIELD
OF FLORIDA, INC.,

Appellant,

v.

ROBERT WEINER, MARGARET WEINER, MARK WEINER and ROBERT WEINER as Personal Representative of the Estate of STEVEN WEINER, BLUE CROSS OF MARYLAND, INC., BLUE SHIELD OF MARYLAND, INC., BLUE CROSS AND BLUE SHIELD OF MARYLAND, INC.,

Appellees.

NOT FINAL UNTIL TIME
EXPIRES TO FILE
REHEARING MOTION
AND, IF FILED,
DISPOSED OF.

CASE NOS. 4-86-2899
4-86-2924
4-86-2925
4-86-2926
and 4-86-2927.

Opinion filed April 26, 1989

Consolidated appeals from the
Circuit Court for Broward County;
Robert L. Andrews, Judge.

Alan C. Sundberg and Sylvia Wabolt of Carlton, Fields, Ward, Emmanuel, Smith, Cutler & Kent, P.A., Tampa; Esler & Kirschbaum, P.A., Fort Lauderdale; Podhurst, Orseck, Parks, Josefsberg, Eaton, Meadow & Olin, Miami; for appellant.

Joan Fowler and G. Bart Billbrough of Walton Lantaff Schroeder & Carson, West Palm Beach, for Blue Cross/Blue Shield of Maryland, Inc., Blue Cross of Maryland, Inc., and Blue Shield of Maryland, Inc.

Larry S. Stewart and James B. Tilghman, Jr., of Stewart Tilghman Fox & Bianchi, P.A., Miami, for Appellees-Weiner.

STONE, J.

This is a consolidated appeal from a final judgment in favor of the Weiners, the insureds, against Blue Cross and Blue Shield of Florida (Florida) and Blue Cross and Blue Shield of Maryland (Maryland). The jury returned a verdict against both companies on claims of fraud and intentional infliction of emotional distress, and against Maryland on negligence as well.

The claims arose out of a denial of coverage by Maryland. Maryland had issued a group health insurance plan which it sold to individual gasoline service station retailers through an independent marketing company, ASFI, supposedly in cooperation with the national and state service station dealers associations. Maryland retained Florida as its agent to service those accounts in this state. Maryland wrote the policies, and prepared a National Account Enrolled Group Summary (NAEGS), which set out guidelines to be followed by the servicing agents in each state in administering the group policy.

The plaintiff joined Service Station Dealers of America and purchased health insurance coverage for his family

through ASFI, which became effective in March 1982. At that time the policy covered his sons, Mark, age 18, and Steven, age 20, who was enrolled as a full-time student. Tragically, on August 21, 1982, Mark, as a result of an accident, became a quadriplegic. During that same summer, Steven was diagnosed as having a fatal illness and did not return to school. Both required hospitalization and extensive nursing care. In August 1983, a decision was made by Maryland, and communicated to plaintiffs through Florida, that Mark was not covered since the accident occurred after his 19th birthday, and that Steven was not covered because he was no longer a full-time student.

In fact, the benefits book prepared by Maryland provided that children were covered until the end of the calendar year in which they turned 19 and that full-time students were covered until the end of the calendar year in which they turned 23. However, the NAEGS provided that, where a 19 year old, or older, child was incapable of self support due to physical incapacity, that child would remain covered, provided the incapacity occurred prior to the child's 19th birthday.

The Weiners' nursing service terminated home care as to both children when they learned that coverage was no longer available. The plaintiffs' attorney contacted Florida and was told that the question of coverage was Maryland's decision. The attorney was referred to a Maryland executive, who advised him that Maryland had terminated coverage. The result was loss and suffering by the family from the lack of nursing care. Florida did offer, and did furnish, a conversion policy as to Mark, which did not include major medical coverage. It did not advise plaintiffs of their right to a conversion policy for Steven.

In October 1983, the Weiners filed suit, alleging the following counts: I.) fraud as to Maryland; II.) fraud as to Florida for falsely representing to the plaintiffs that they needed to purchase a conversion policy for Mark after his 19th birthday; III.) intentional infliction of mental distress as to

both companies; IV.) negligence as to Maryland; and V.) negligence as to Florida. In March 1984, Maryland agreed to reinstate the coverage. The jury found in favor of Florida on the negligence claim and in favor of plaintiffs on all other counts. The verdict against Maryland was for $500,000 compensatory damages and $5,000,000 punitive damages, and against Florida for $200,000 compensatory and $1,500,000 punitive damages.

With respect to the fraud claim, Florida contends that there was no evidence that the conduct of its employees was anything more than negligent. Florida argues that it was entitled to rely upon what it was told by its principal, Maryland, and by ASFI, as it did not have the contract, even if a copy of the booklet was in Florida's possession. We concur, and conclude that Florida was entitled to a directed verdict on the fraud claim. Recovery for fraud requires proof of intentional and knowing misrepresentation of material fact, designed to cause detrimental reliance. *See First Interstate Development Corp. v. Ablanedo,* 511 So.2d 536 (Fla. 1987); *A.S.J. Drugs, Inc. v. Berkowitz,* 459 So.2d 348 (Fla. 4th DCA 1984). As an agent, Florida relayed the decisions of its principal to plaintiffs and their attorney. There was no proof of any intentional misrepresentation or any actual knowledge by Florida that Mark and Steven remained covered by the Maryland policy.

While the failure of Florida to provide broader benefits in the conversion contract may have been negligent, or a breach of contract, there is no proof of fraud. The evidence reflects that even prior to the accident, ASFI, which had no connection to Florida, had advised plaintiffs of the impending expiration of coverage upon Mark's 19th birthday and directed the insured to contact Florida about conversion to a non-group plan for Mark, and that this advice was subsequently repeated to plaintiffs by ASFI. It is further apparent from the record that once Maryland decided to terminate coverage, Florida had a contractual duty to offer the alternative coverage. Thus, the plaintiffs failed to establish that

Florida knew that any of its representations, either as to the need for a conversion policy or as to coverage under either policy, were false.

With respect to the intentional infliction of emotional distress claim against Florida, we also reverse. In *Metropolitan Life Insurance Co. v. McCarson,* 467 So.2d 277 (Fla. 1985), the supreme court applied these comments given in the *Restatement (Second) of Torts,* §46 (1965):

> d. Extreme and outrageous conduct
>
> . . . It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by "malice," or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"
>
> . . . .
>
> g. The conduct, although it would otherwise be extreme and outrageous, may be privileged under the circumstances. The actor is never liable, for example, where he has done no more than to insist upon his legal rights in a permissible way, even though he is well aware that such insistence is certain to cause emotional distress.

There, Metropolitan Life issued a group insurance policy to McCarson, which covered employees of his shop, including his wife. Mrs. McCarson became incapacitated the next year with Alzheimer's disease, and the insurer stopped payment of her benefits, claiming her condition was preexisting. McCarson filed suit and Metropolitan Life was found in

breach of contract and ordered to provide coverage. Mrs. McCarson later needed continual nursing care, for which Metropolitan was responsible until the policy lapsed or she became eligible for Medicare. The insurer requested proof of ineligibility for Medicare, and discontinued payment of benefits when it received no response. Looking at the facts in the light most favorable to the plaintiff, the supreme court ruled that they were not, as a matter of law, " 'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency.' " *McCarson* at 279.

Here, there was no evidence that Florida had the authority to make independent coverage decisions with respect to Maryland's policy, and it initially double checked the coverage question with Maryland. In any event, it is undisputed that, when questioned about the coverage issue, Florida referred plaintiffs' counsel to Maryland, and that all further discussions were between them. The proof simply failed to reach the heavy burden required for recovery on this tort. *See Metropolitan Life Insurance Co. v. McCarson; Swinarski v. Keller,* 529 So.2d 1208 (Fla. 4th DCA 1988); *Davis v. Gulf Life Insurance Co.,* 502 So.2d 1012 (Fla. 3d DCA 1987). *See also Campbell v. Prudential Insurance Co.,* 480 So.2d 666 (Fla. 5th DCA 1985). *Cf. Dominguez v. Equitable Life Assurance Society of the United States,* 438 So.2d 58 (Fla. 3d DCA 1983).

Therefore as to Florida, we conclude that the trial court erred in denying Florida's motion for directed verdict as to the plaintiffs' claims for fraud and intentional infliction of emotional distress, and reverse.

With respect to Maryland, we first find no error in the instruction to the jury that ASFI was an agent of Maryland in connection with the group health plan. Ordinarily the existence of an agency relationship is a question of fact. *Orlando Executive Park, Inc. v. Robbins,* 433 So.2d 491 (Fla. 1983); *Folwell v. Bernard,* 477 So.2d 1060 (Fla. 2d DCA 1985), *rev. denied,* 486 So.2d 595 (Fla. 1986). However, here the relationship between Maryland and ASFI, in the devel-

opment of and the national marketing of the group plan, in distributing Maryland's benefit book, and in other acts pursuant to the agreement between them, is susceptible of only one interpretation. *See Jaar v. University of Miami,* 474 So.2d 239 (Fla. 3d DCA 1985), *rev. denied,* 484 So.2d 10 (Fla. 1986). Therefore, the trial court did not err in concluding as a matter of law that ASFI was acting on Maryland's behalf.

As to Maryland, we are satisfied that there was sufficient evidence in the record, when considering inferences that may be drawn from the proofs, to submit the issue of fraud to the jury. *See U.S. Home Corporation, Rutenberg Homes Division v. Metropolitan Property and Liability Insurance Co.,* 516 So.2d 3 (Fla. 2d DCA 1987); *Needle v. Lowenberg,* 421 So.2d 678 (Fla. 4th DCA 1982), *rev. denied,* 427 So.2d 737 (Fla. 1983); *Nantell v. Lim-Wick Construction Co.,* 228 So.2d 634 (Fla. 4th DCA 1969). *Cf. Sun Life Assurance Company of Canada v. Land Concepts, Inc.,* 435 So.2d 862 (Fla. 4th DCA 1983); *First National Bank of Stuart v. Jackson,* 267 So.2d 697 (Fla. 4th DCA 1972). We also find no error in submitting the issue of punitive damages to the jury. *First Interstate Development Corp. v. Ablenado,* 511 So.2d 536 (Fla. 1987); *Rappaport v. Jimmy Bryan Toyota of Fort Lauderdale, Inc.,* 522 So.2d 1005 (Fla. 4th DCA 1988); *Ruding v. Thompson,* 517 So.2d 706 (Fla. 4th DCA 1987)

The appellees argue that Maryland's motion for directed verdict on the punitive damage issue did not question the sufficiency of proof on the fraud and emotional distress claims. However, we need not examine this point, nor whether the evidence supports the jury's findings that Maryland's actions amounted to an intentional infliction of emotional distress. The verdict form used here does not contain separate findings for damages for each count pled. As the verdict may be sustained on any one of the theories submitted to the jury, reversal is improper where no error is found as to one of those theories. *See Colonial Stores, Inc. v. Scarbrough,* 355 So.2d 1181 (Fla. 1978); *Florida Patient's Compensation Fund v. Sitomer,* 524 So.2d 671 (Fla. 4th DCA

1988); *Howell v. Woods*, 489 So.2d 154 (Fla. 4th DCA 1986); *Getelman v. Leve* , 481 So.2d 1236 (Fla. 3d DCA 1985).

Maryland's principal assertion on appeal is that there is a lack of jurisdiction over the subject matter because the plaintiff's claim is preempted by the Employee Retirment Income Security Act of 1974, 29 U.S.C. §1001-1461, ("ERISA"), and that state courts do not have concurrent jurisdiction. *See also Pilot Life Insurance Co. v. Dedeau*, 481 U.S. 41, 107 S.Ct. 1549, 95 L. Ed. 2d 39 (1987). However, we find that ERISA does not apply to this policy.

ERISA regulates employee benefit plans, including ones providing for medical and hospital care, if the plan is established or maintained by an employer or employee organization, or both. ERISA §4(a), 29 U.S.C. §1003(a). Here, the record does not support a conclusion that there was an employee plan. The record does not reveal any agreement between the service station dealers associations and Maryland or AFSI. The evidence, although disputed, reflects that the plaintiff here was a sole proprietor who simply purchased a group policy for his family. *See Xaros v. U.S. Fidelity and Guaranty Co.*, 820 F. 2d 1176 (11th Cir. 1987); *Donovan v. Dillingham*, 688 F. 2d 1367 (11th Cir. 1982); *Taggart Corp. v. Life and Health Benefits Administration, Inc.*, 617 F. 2d 1208 (5th Cir. 1980). Here there was no plan, or even an informal agreement, established or maintained by an employer or an employee organization. Nor were any fiduciary responsibilities created by this insurance marketing scheme, which simply made group insurance available to members of the organization.

Maryland contends that attorney's fees were improperly taxed under section 627.428, Florida Statutes. However, it appears that this action involved additional issues other than those presented on appeal regarding the plaintiffs' tort claims. The trial court found that matters of coverage and interpretation of the policy were the "central core" of the trial. The trial court acknowledged that the sums sought and amount of hours appeared large, but were in part neces-

sitated by obstructionist tactics. Generally claimants are not entitled to attorney's fees under section 627.428 in a tort action. *E.g., United General Life Insurance Co. v. Koske*, 519 So.2d 71 (Fla. 5th DCA 1988); *United Services Automobile Association v. Kiibler*, 364 So.2d 57 (Fla. 3d DCA 1978). However, the trial court determined that this award was founded on the hours utilized in resolving coverage. Nor has Maryland shown that the amount of the fee was clearly excessive. *See Good Samaritan Hospital Ass'n v. Saylor*, 495 So.2d 782 (Fla. 4th DCA 1986). *See also State Farm Fire & Casualty Co. v. Palma*, 524 So.2d 1035 (Fla. 4th DCA 1988).

As we are reversing the judgment against Florida, the award of attorney's fees in favor of the insured must be reversed as to Florida. We therefore reverse the judgment of attorney's fees and remand in order that they may be reapportioned as to Maryland alone.

We find the other issues raised by Maryland also to be without merit. Therefore, the final judgment is affirmed as to Maryland and reversed as to Florida. We remand so that an amended judgment against Maryland may be entered accordingly.

DOWNEY and LETTS, JJ., concur.

Supreme Court, U.S.
FILED
SEP 13 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-250

In The

Supreme Court of the United States

October Term, 1989

BLUE CROSS AND BLUE SHIELD
OF MARYLAND, INC.,

Petitioner,

v.

ROBERT WEINER, SR., MARGARET WEINER,
MARK WEINER, and ROBERT WEINER, SR.,
as Personal Representive of the Estate of Steven Weiner,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Eleventh Circuit erred in permitting a Florida state court to decide whether its jurisdiction had been preempted by ERISA.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 6

1. The Decision Below Does Not Raise the Question Presented in the Petition 6

2. The Eleventh Circuit Correctly Applied the *Rooker-Feldman* Doctrine 9

3. ERISA Preemption is Not in Need of Clarification 14

4. The Eleventh Circuit's Decision does Not Demonstrate a Need for Guidance as to the Scope of ERISA's Coverage 18

5. The Eleventh Circuit's Decision Was Also Proper on the Grounds of Abstention 21

CONCLUSION 22

TABLE OF AUTHORITIES

Page

CASES

Aluminum Co. of America v. Utilities Comm'n of North Carolina, 713 F.2d 1024 (4th Cir. 1983), *cert. denied*, 465 U.S. 1052 (1984) 22

Amalgamated Clothing Workers of America v. Richman Brothers, 348 U.S. 511 (1955) 14, 18

Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Engineers, 398 U.S. 281 (1970) 12

Bagget v. Department of Professional Regulation Bd. of Pilot Comm'rs, 717 F.2d 521 (11th Cir. 1983) 22

Barry v. Dymo Graphic Systems, Inc., 394 Mass. 830, 478 N.E. 2d 707 (Mass. 1985) 8

Brandenberg v. First Maryland Sav. and Loan, Inc., 660 F.Supp. 717 (D. Md. 1987), *aff'd*, 859 F.2d 1179 (4th Cir. 1988) 22

Brotherhood of Locomotive Engineers v. Massachusetts Commission Against Discrimination, 695 F.Supp. 1321 (D. Mass. 1988) 12

Browning Corp. Int'l v. Lee, 624 F.Supp. 555 (N.D. Tex. 1986) 8

Bruenn v. Aetna Life Ins. Co., 197 Cal. App. 3d 1000, 243 Cal. Rptr. 262 (Cal. App. 2 Dist. 1987) 8

Caterpillar, Inc. v. Williams, 482 U.S. 386 (1987) 15, 18

Chick Kam Choo v. Exxon Corp., 486 U.S. 140 (1988) 14

District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983) 9, 10, 13

Donovan v. Dillingham, 688 F.2d 1367 (11th Cir. 1982) 19, 21

Durfee v. Duke, 375 U.S. 106 (1963) 15

TABLE OF AUTHORITIES – Continued

Page

E-Systems, Inc. v. Taylor, 744 S.W. 2d 956 (Tex App. - Dallas 1988) 8

Fore Way Express, Inc. v. Wisconsin Dept. of Indus., Labor and Human Relations, 660 F.Supp. 310 (E.D. Wis. 1987) 22

Fresh Int'l Corp. v. Agricultural Labor Relations Bd., 805 F.2d 1353 (9th Cir. 1986) 22

Hathorn v. Lovorn, 457 U.S. 255 (1982) 15

Hobbs v. United States Office of Personnel Management, 485 F.Supp. 456 (M.D. Fla. 1980) 11

Hollins v. Wessel, 819 F.2d 1073 (11th Cir. 1987) 13

Hood v. Prudential Ins. Co., 522 So.2d 265 (Ala. 1988) 8

Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982) 16

International Longshoremen's Ass'n v. Davis, 476 U.S. 380 (1986) 7, 15

Johansen v. Employee Benefit Claims, Inc., 668 F.Supp. 1294 (D. Minn. 1987) 8

Kalb v. Feuerstein, 308 U.S. 433 (1940) 15, 16

Kremer v. Chemical Const. Corp., 456 U.S. 461 (1982) 17

Marcal Paper Mills, Inc. v. Ewing, 790 F.2d 195 (1st Cir. 1986) 22

Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373 (1985) 17

Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58 (1987) 7, 8, 14

TABLE OF AUTHORITIES – Continued

Page

Parsons Steel, Inc. v. First Alabama Bank, 474 U.S. 518 (1986) 16

Peick v. Murray, 141 Ill. App. 3d. 1081, 491 N.E. 2d 100 (Ill. App. 1 Dist. 1986) 8

Pennzoil Co. v. Texaco, Inc., 481 U.S. 1 (1987) 21

Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987) 6, 8, 14

Providence Hosp. v. National Labor Union Health and Welfare Fund, 162 Mich. App. 191, 412 N.W. 2d 690 (Mich. App. 1987) 8

Richland Hosp. Inc. v. Raylon, 33 Ohio St. 3d 87, 516 N.E. 2d 1236 (Ohio 1987) 8

Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923) 9

Staley v. Ledbetter, 837 F.2d 1016 (11th Cir. 1988)..11, 13

Stoll v. Gottlieb 305 U.S. 165 (1938) 16

Taggart Corp. v. Life & Health Benefits Administration, 617 F.2d 1208 (5th Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981) 21

Takeda v. Northwestern Nat'l Life Ins. Co., 765 F.2d 815 (9th Cir. 1985) 8

Texaco, Inc. v. Pennzoil Co., 784 F.2d 1133 (2d Cir. 1986), *rev'd on other grounds*, 481 U.S. 58 (1987) 11

Texas Employers' Ins. Assoc. v. Jackson, 820 F.2d 1406 (5th Cir. 1987), *modified on reh'g*, 862 F.2d 491 (1988) 17

Transamerica Occidental Life Ins. Co. v. Digregorio, 811 F.2d 1249 (9th Cir. 1987) 8

TABLE OF AUTHORITIES – Continued

Page

Underwriters Nat'l Assurance Co. v. North Carolina Life and Accident and Health Ins. Guar. Assoc., 455 U.S. 691 (1982) 16

Wisconsin Educ. Ass'n Ins. Trust v. Iowa State Bd. of Public Instruction, 804 F.2d 1059 (8th Cir. 1986) 20

Younger v. Harris, 401 U.S. 37 (1971) 21

STATUTES

Anti-Injunction Act, 28 U.S.C. §2283 .....12, 17

Civil Rights Act of 1964, 42 U.S.C. §2000e 17

Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001 *et seq.* 1, 6, 7, 19

Full Faith and Credit Act, 28 U.S.C. §1738 .....16, 17

Labor Management Relations Act of 1947, 29 U.S.C. §185..... 15

Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901 *et seq.* 17

National Labor Relations Act, 29 U.S.C. §151 *et seq.*..... 7

Voting Rights Act of 1965, 42 U.S.C. §1971 *et seq.* 15

OTHER AUTHORITIES

H.R. Rep. No. 1785, 94th Cong., 2nd Sess. 48 (1977) 20

No. 89-250

In The

Supreme Court of the United States

October Term, 1989

BLUE CROSS AND BLUE SHIELD
OF MARYLAND, INC.,

Petitioner,

v.

ROBERT WEINER, SR., MARGARET WEINER,
MARK WEINER, and ROBERT WEINER, SR.,
as Personal Representative of the Estate of Steven Weiner,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioner, Blue Cross and Blue Shield of Maryland, Inc. ("BCBSM"), begs the question that confronted the United States Court of Appeals for the Eleventh Circuit when it introduces the case as one to set aside the judgment of a state court whose subject matter jurisdiction was preempted by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.* As

will be set forth below, the case in reality was one to prevent the Florida courts from determining the very issue BCBSM at first prejudged, and then lost. The issue is not whether the Florida courts can proceed without jurisdiction, but whether they can determine if they have it.

In 1982, Respondent Robert Weiner, Sr. purchased health insurance for his family from BCBSM. That summer, one of his sons, Respondent Mark Weiner, was involved in an accident and became a quadriplegic. At about the same time another son, Steve, became ill and was diagnosed as having AIDS. Steve would also become paralyzed before he died.

The boys' health care needs were staggering, but for almost a year they were met with BCBSM's coverage. Then, in 1983, BCBSM denied coverage to both Mark and Steve. This was done through fabricated coverage defenses, and on the basis of terms contained in the master policy which were intentionally contrary to the coverage representations BCBSM made in the benefits book it provided the Weiner family (collectively "Weiners") when the policy was sold. Without insurance coverage, the family subsisted in a trailer with Mr. and Mrs. Weiner trying to take care of their two paralyzed sons, one dying. The ordeal they went through cannot, and fortunately need not, be described in the limited space available here.

In 1984 the Weiners instituted suit against BCBSM and its servicing agent, Blue Cross and Blue Shield of Florida, Inc. ("BCBSF"), in Florida state court. After more than two years of discovery, the case went to the jury on

the Weiners' claims of fraud, intentional infliction of emotional distress and negligence. The jury returned separate verdicts against both BCBSM and BCBSF, finding against BCBSM on all counts. Final judgments were entered by the state trial court in the fall of 1986. BCBSM never raised the issue of ERISA preemption in the state trial court.

BCBSM appealed the state court judgment to the District Court of Appeal of Florida, Fourth District. In obvious recognition of the fact that Florida courts could decide the question of ERISA preemption, BCBSM raised the issue before the Florida appellate court in 1987, contending that the judgment was void because the trial court's subject matter jurisdiction had been preempted by ERISA.

The problem with BCBSM's argument was that the evidence at trial showed that no employee benefit plans existed in connection with Mr. Weiner's purchase of health insurance. While the insurance Mr. Weiner purchased from BCBSM purported to be part of a plan established by the Service Station Dealers of America ("SSDA"), an association of employers, it turned out that this was just a fraudulent marketing scheme. The reality was that the group policy was established and maintained by BCBSM and Associated Financial Services, Inc. ("AFSI"), an insurance broker, to target a perceived market niche. (R. 1-24-1, 2, 89, 101, 103).[1] SSDA was never

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[1] Citations are to the Record below.

consulted about the plan, it never gave BCBSM permission to use its name, and its signature was actually forged on the insurance contracts which made up the plan. (R. 1-24-72-77, 84). The decision to limit the insureds to service station dealers and their employees was an "underwriting decision" made by BCBSM and AFSI (R. 1-24-96), not the product of any employer-employee relationships.

Twelve days after the insurance contracts were forged, an endorsement was issued to the policies eliminating SSDA as both the contracting party and the insured group. AFSI, the insurance broker, was substituted in its place. (R. 1-24-59, 77). Thereafter, no further agreements or endorsements, with the Allied Gasoline Retailers Association of Florida ("AGRA") or any other entity, were made. (R. 1-24-65, 85).

The group insurance policy was then marketed as an SSDA plan, but it was nothing more than an arrangement between two entrepreneurial businesses to sell insurance. It was never established or maintained by an employer or association of employees. Consistent with its true nature, no attempt was ever made to comply with ERISA's reporting requirements.

Mr. Weiner himself ran a service station in Dania, Florida as a sole proprietor. His purpose in purchasing BCBSM's insurance was to provide coverage for his family, and they were the only insureds. (R. 1-24-63, 100; 2-36-69). One son did work for him, but no insurance was purchased for any other employees. Mr. Weiner made no attempt to comply with ERISA's reporting requirements.

In April of 1988, some 18 days before oral argument was to take place in the Florida appellate court, BCBSM

filed an action for declaratory and injunctive relief and a motion for preliminary injunction in the United States District Court for the Southern District of Florida. BCBSM asked the district court to declare the state court judgment void and unenforceable, to temporarily and permanently enjoin the Weiners from attempting to enforce their judgment, and to temporarily and permanently enjoin the Weiners from taking any further action in the Florida appellate court – all on the basis of ERISA preemption.

The district court afforded BCBSM an emergency hearing, received extensive memoranda, and on May 16, 1988 entered an Order Denying Motion for Preliminary Injunction. In addition to denying preliminary injunctive relief, the district court abstained, noting that ERISA preemption was "a far cry from being 'readily apparent'."

BCBSM appealed the district court's decision to the Eleventh Circuit which on April 5, 1989 affirmed the district court's decision to abstain and ordered BCBSM's action dismissed because the district court lacked subject matter jurisdiction under the *Rooker-Feldman* doctrine. BCBSM's Suggestion of Rehearing in Banc was denied.

On April 26, 1989 the Florida court issued its decision affirming the judgment against BCBSM and reversing the judgment against BCBSF. With regard to BCBSM's claim of ERISA preemption, the Florida appellate court rejected it because the facts showed there was no employee benefit plan.

REASONS FOR DENYING THE WRIT

1. The Decision Below Does Not Raise the Question Presented in the Petition

BCBSM recasts the case below as one in which the Eleventh Circuit held that a Florida Court could proceed even though its subject matter jurisdiction was preempted by ERISA. But the Eleventh Circuit made no such determination. The issue decided by the Eleventh Circuit was whether the Florida court should be prevented from determining if its subject matter jurisdiction was preempted by ERISA.

When the question is properly presented, the Eleventh Circuit's decision falls into a long line of legislative and judicial pronouncements that state courts may, and indeed must decide whether their jurisdiction has been preempted by ERISA.

The issue before the Florida appellate court when BCBSM sought to enjoin it was not the reach of ERISA preemption, which was clearly defined in *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987), but whether or not an employee benefit plan existed at all. Congress itself intended for state courts to have the power to make this determination. For example, Congress gave state courts concurrent jurisdiction over actions by participants to clarify rights or obtain benefits due under an ERISA plan. 29 U.S.C. §1132(a)(1)(b), (e)(1). This grant of jurisdiction presumes both the power and the ability to determine if an employee benefit plan exists in the first place. Similarly, Congress provided that state laws regulating insurance would not be preempted by ERISA, but that certain employee benefit plans could not be deemed to be in the

insurance business. 29 U.S.C. §1144(b)(2)(A)-(2)(B). Again, this presumes that state courts will have the power and ability to identify ERISA plans in the enforcement of their own insurance laws.

This Court has also mandated that state courts make the threshold federal preemption decision in the analogous context of preemption under the National Labor Relations Act ("NLRA"), 29 U.S.C. §151 *et seq.*[2] In *International Longshoremen's Ass'n v. Davis*, 476 U.S. 380 (1986), an employee filed a common law fraud action against a union in an Alabama state court. The union did not raise the issue of federal preemption until after trial, and the Alabama courts refused to consider it for procedural reasons. In holding that the Alabama courts erred in refusing to consider the issue, the Court commanded that when a claim of federal preemption is raised

> it must be considered and resolved by the state court.

Id. at 393. There is no reason for the rule to be any different with ERISA preemption,[3] and the Florida appellate court was trying to do exactly what this Court mandated in *Davis* when BCBSM sought to enjoin it.

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[2] The Court equated the preemptive power of ERISA and NLRA in *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987).

[3] This is also an inescapable corollary of the Court's decision in *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987), where an ERISA preemption defense was held to justify federal question removal. Removal is not self-executing, and if the state court action is not removed, as was the case here, the state court must, perforce, resolve the question of ERISA preemption.

Likewise, the lower federal courts have repeatedly stated that state courts can properly determine whether claims before them have been preempted by ERISA. *See, e.g., Transamerica Occidental Life Ins. Co. v. Digregorio,* 811 F.2d 1249, 1255 n.5 (9th Cir. 1987) ("[T]he state courts are perfectly competent to decide this issue"); *Takeda v. Northwestern Nat'l Life Ins. Co.,* 765 F.2d 815, 822 n.10 (9th Cir. 1985) ("[T]he state court to which we remand this case is fully capable to decide issues of preemption if defendants continue to assert them."); *Johansen v. Employee Benefit Claims, Inc.,* 668 F.Supp. 1294, 1297 (D. Minn. 1987) ("If defendants are correct that the *Dedeaux* and *Taylor* cases provide a federal pre-emption defense and that ERISA and not state law controls, the state court will be bound to apply federal law"); *Browning Corp. Int'l v. Lee,* 624 F.Supp. 555, 557 (N.D. Tex. 1986) ("[S]tate courts as well as federal courts are of competent jurisdiction to determine whether a particular plan is governed by ERISA and therefore not by state law").

Finally, the state courts are routinely making this determination and dismissing state claims if they are preempted by ERISA. *See, e.g., Hood v. Prudential Ins. Co.,* 522 So.2d 265 (Ala. 1988); *Bruenn v. Aetna Life Ins. Co.,* 197 Cal. App. 3d 1000, 243 Cal. Rptr. 262 (Cal. App. 2 Dist. 1987); *Peick v. Murray,* 141 Ill. App. 3d 1081, 491 N.E. 2d 100 (Ill. App. 1 Dist. 1986); *Barry v. Dymo Graphic Systems, Inc.,* 394 Mass. 830, 478 N.E. 2d 707 (Mass. 1985); *Providence Hosp. v. National Labor Union Health and Welfare Fund,* 162 Mich. App. 191, 412 N.W. 2d 690 (Mich. App. 1987); *Richland Hosp. Inc. v. Ralyon,* 33 Ohio St. 3d 87, 516 N.E. 2d 1236 (Ohio 1987); *E-Systems, Inc. v. Taylor,* 744 S.W. 2d 956 (Tex App. – Dallas 1988).

Thus, the Eleventh Circuit's decision to let the Florida appellate court decide whether state court jurisdiction had been preempted by ERISA is consistent with the pronouncements of Congress, this Court and the lower federal courts, and is in keeping with the actual practice of the state courts. Moreover, when the decision is seen for what it is, the reasons BCBSM invokes to promote review by this Court disappear. The Eleventh Circuit did not commit an injustice by deciding that the Florida courts could proceed without jurisdiction. The issue of who should decide the ERISA preemption question was decided pursuant to, rather than in the absence of guidance by this Court. And the scope of ERISA's coverage was not even an issue.

BCBSM's real complaint is that the Florida court's factual determination that no ERISA plan existed was incorrect. BCBSM is wrong, but the point at this juncture is that the Florida court's decision does not provide a basis for review of the Eleventh Circuit's decision.

2. The Eleventh Circuit Correctly Applied The *Rooker-Feldman* Doctrine

Because the state court proceedings BCBSM sought to enjoin had already gone to judgment, the Eleventh Circuit rested its decision not to halt the Florida appellate process on the *Rooker-Feldman* doctrine.

The *Rooker-Feldman* doctrine, named for this Court's decisions in *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), is a product of federalism, and more

particularly of the limited jurisdiction of federal district courts in our dual court system. Specifically,

> a United States district court has no authority to review final judgments of a state court in judicial proceedings.

District of Columbia Court of Appeals v. Feldman, 460 U.S. at 482. Thus, when issues of federal law arise in state court proceedings, their review is left to the state appellate process and ultimately to this Court. A federal district court may not entertain original proceedings which would have the effect of reviewing and overturning a state court judgment.

This is precisely what BCBSM's district court action for declaratory and injunctive relief was designed to accomplish. But BCBSM argues that the Eleventh Circuit erred in relying on the *Rooker-Feldman* doctrine because it only applies to district court review of federal constitutional issues, and not when the federal issue is one of preemption or jurisdiction. No authority is cited for this proposition, and the limitations BCBSM perceives in the *Rooker-Feldman* doctrine are fanciful.

On a conceptual level, the limited jurisdiction of a federal district court does not depend upon the nature of the federal question subsumed in a state court judgment. A federal district court either has original jurisdiction to review state court judgments or it does not. And there is certainly nothing about the ERISA preemption decision, which state courts are supposed to make, that alters the structure of our dual court system.

In application, no court has ever imposed the limits BCBSM would impose on the *Rooker-Feldman* doctrine.

While it is certainly invoked when constitutional challenges are launched against state court judgments, it is also applied when the federal challenge is based upon non-constitutional grounds,[4] and when the federal issue goes to preemption or state court jurisdiction. In *Texaco, Inc. v. Pennzoil Co.*, 784 F.2d 1133 (2d Cir. 1986), *rev'd on other grounds*, 481 U.S. 58 (1987), Texaco sought to enjoin enforcement of Pennzoil's state court judgment on the ground, *inter alia*, that the judgment was void because Pennzoil's claims were preempted by federal securities law over which the federal courts had exclusive jurisdiction. The Second Circuit held that the district court had no jurisdiction over this aspect of Texaco's claim because it was barred by the *Rooker-Feldman* doctrine. 784 F.2d at 1143.[5]

In *Hobbs v. United States Office of Personnel Management*, 485 F.Supp 456 (M.D. Fla. 1980), a California court had awarded the wife part of the husband's federal pension in a divorce decree. The husband brought an action in federal district court to have the divorce decree declared void on the ground that the California court had

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[4] *See, e.g., Staley v. Ledbetter*, 837 F.2d 1016 (11th Cir. 1988) (challenge based upon constitutional rights as well as Child Welfare Act of 1980).

[5] This Court went on to reverse the Second Circuit's decision that an injunction was proper based upon Texaco's constitutional challenges to Texas' supersedeas requirements. A majority of the Court felt that this aspect of the case was not controlled by the *Rooker-Feldman* doctrine because the requirement of a bond was collateral to the state court's judgment.

no jurisdiction over the Federal Retirement Fund. Summary judgment was granted on the basis of the *Rooker-Felman* doctrine.

In *Brotherhood of Locomotive Engineers v. Massachusetts Commission Against Discrimination*, 695 F.Supp. 1321 (D. Mass. 1988), a union brought an action to enjoin state discrimination proceedings on the ground of federal preemption. The district court abstained, but also noted that it had "no competence to sit in review of state court judgments" because of the *Rooker-Feldman* doctrine. *Id.* at 1324 n.1

And in *Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281 (1970), this Court affirmed the *Rooker-Feldman* principle in the context of federal preemption. The union sought an injunction from the district court on the ground that it had a right to picket under federal law, and that state law was preempted. The decision centered on the Anti-Injunction Act, 28 U.S.C. §2283, but because the union was trying to get the federal district court to review the state court's interpretation of federal law, the Court reiterated that

> lower federal courts possess no power whatever to sit in direct review of state court decisions.

398 U.S. at 296.

These decisions make it clear that the Eleventh Circuit did not misapply the *Rooker-Feldman* doctrine. Further, no conflict of decisions exists, and none is claimed to exist.

BCBSM also challenges the Eleventh Circuit's decision on the ground that the ERISA preemption question

was not "inextricably intertwined" with the Florida court judgment because the issue was never raised in the trial court. No authority is cited for this argument, and for good reason. The *Rooker-Feldman* doctrine is routinely applied when the federal issue raised in the district court was not raised in state court at all, or was raised for the first time on appeal. *See, e.g., District of Columbia Court of Appeals v. Feldman*, 460 U.S. at 482 n. 16; *Staley v. Ledbetter*, 837 F.2d 1016 (11th Cir. 1988); *Hollins v. Wessel*, 819 F.2d 1073 (11th Cir. 1987). At any rate, the point is moot now because BCBSM raised the question before the Florida appellate court, and it was decided.

Beyond this, the question of whether or not the Florida trial court's jurisdiction was preempted by ERISA is obviously inextricably intertwined with its judgment. Apart from the fact that the issue of a court's subject matter jurisdiction is always inherently bound up in its judgment, the factual issues upon which the claim of ERISA preemption depends – the nature of the Weiners' insurance policy, the circumstances under which it was purchased and the relationship between their tort claims and the administration of benefits under the policy, were all litigated in state court and are part and parcel of the final judgment.

Finally, BCBSM's suggestion that the Eleventh Circuit's application of the *Rooker-Feldman* doctrine should be considered "dangerous" because state courts are not competent to decide questions of ERISA preemption is ill-conceived. As discussed in the previous section of this brief, the lower federal courts have repeatedly held that state courts are competent to make this decision, and this Court has rejected the argument "that federal rights will

not be adequately protected in state courts" in the context of federal preemption of state court jurisdiction. *Amalgamated Clothing Workers of America v. Richman Brothers*, 348 U.S. 511, 518 (1955). *Accord, Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140 (1988).

3. ERISA Preemption is Not in Need of Clarification

BCBSM suggests that the Eleventh Circuit's decision demonstrates a need to clarify ERISA's preemptive power because the effect of the decision was to deprive it of a collateral attack upon a Florida judgment. There are two responses to this non sequitur.

First, the preemptive force of ERISA was only recently defined and clarified by this Court in *Pilot Life* and *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987), and BCBSM has demonstrated no confusion in this regard. To the contrary, the authorities cited in the first section of this brief indicate that ERISA preemption is understood, and that the framework for enforcing it is well established.

Second, BCBSM had no right to a collateral attack. The argument might be legitimate if the Florida court had determined that the claims before it were preempted by ERISA but proceeded anyway, i.e., usurped jurisdiction. But this did not happen. The Florida court simply considered and resolved the ERISA preemption defense on the facts before it. As already discussed, the Florida court had both the power and the obligation to make this decision.

This is further demonstrated by this Court's repeated recognition of the role of state courts in deciding federal preemption defenses, even when the defense goes to the jurisdiction of the state court because of the potential for exclusive federal jurisdiction. In *International Longshoremen's Ass'n v. Davis*, the Court required state courts to consider and resolve NLRA preemption defenses. In *Hathorn v. Lovorn*, 457 U.S. 255 (1982), where exclusive federal jurisdiction over actions under the Voting Rights Act of 1965, 42 U.S.C. §1971 *et seq.*, was at issue, the Court held that state courts had the authority to determine whether the Act applied to actions before them. And in *Caterpillar, Inc. v. Williams*, 482 U.S. 386 (1987), where federal preemption under the NLRA and the Labor Management Relations Act of 1947, 29 U.S.C. §185, was at issue, the Court told the employer to make its preemption arguments in state court.

What BCBSM really suggests with its collateral attack argument is that a postscript be added to the rule that state courts have the power to decide federal preemption defenses – that their decisions do not count. The argument is based upon this Court's decision in *Kalb v. Feuerstein*, 308 U.S. 433 (1940),[6] where a collateral attack based upon federal preemption and exclusive federal jurisdiction was permitted. In *Kalb*, however, the state court proceeded in the face of the automatic stay of bankruptcy and refused to consider the question of its own subject

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[6] BCBSM also cites *Durfee v. Duke*, 375 U.S. 106 (1963). But the Court's statement in that case that the doctrine of federal preemption "may in some contexts be controlling", *id.* at 114, was dicta. There was no issue of federal preemption involved in the case.

matter jurisdiction. There is no such usurpation of jurisdiction here, and the difference is manifest. Here, the ouster of subject matter jurisdiction was not automatic, but depended upon a factual determination as to whether or not an employee benefit plan existed. The Florida court did not refuse to consider this issue. Rather, it considered and resolved it, just like it was supposed to do. The principle in *Kalb* does not apply in this situation.

There is simply no justification or authority for sanctioning automatic collateral attacks against state court determinations of ERISA or any other kind of federal preemption defense. The Full Faith and Credit Act, 28 U.S.C. §1738, requires federal courts to give the same preclusive effect to state court judgments as another court of that state would give. *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518 (1986). The principles of *res judicata* this invokes apply to state court determinations of their own subject matter jurisdiction. When the question of subject matter jurisdiction has been decided, it may be reviewed directly, including requesting this Court to review the matter on a writ of certiorari, but it may not be attacked collaterally. *See, e.g., Underwriters Nat'l Assurance Co. v. North Carolina Life and Accident and Health Ins. Guar. Assoc.*, 455 U.S. 691, 706-710 (1982); *Stoll v. Gottlieb*, 305 U.S. 165 (1938).[7]

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[7] The same rule applies when the party collaterally attacking subject matter jurisdiction could have, but failed to raise the issue in the court whose judgment is contested. *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n. 9 (1982). This was the situation facing the Eleventh Circuit, but the point is now moot. The question of ERISA preemption has been contested and resolved in the Florida appellate court.

These principles have also been invoked by federal courts when the subject of the collateral attack is a lack of state court jurisdiction due to exclusive federal court jurisdiction. For example, in *Texas Employers' Ins. Assoc. v. Jackson*, 820 F.2d 1406 (5th Cir. 1987), *modified on reh'g*, 862 F.2d 491 (1988), the federal plaintiff sought declaratory and injunctive relief to stop a state court action it claimed was preempted by the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901 *et seq.*, a form of preemption the Fifth Circuit found to be as powerful as ERISA or NLRA preemption. The state trial court had already considered and rejected the preemption defense in an interlocutory ruling, but no final judgment had been rendered. The Fifth Circuit declined to accord the state court interlocutory ruling *res judicata* effect, but acknowledged that if the trial had gone to judgment *res judicata* would have barred the federal courts from reconsidering the state court's decision concerning federal preemption. Similarly, this Court gave a state court determination *res judicata* effect in a claim of employment discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, without feeling the need to decide whether the federal courts had exclusive jurisdiction over such claims. *Kremer v. Chemical Const. Corp.*, 456 U.S. 461 (1982). *Accord, Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373 (1985).[8]

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[8] Both the Full Faith and Credit Act and the Anti-Injunction Act were enacted by Congress when the dual court system of this country was first being structured. Each proceed from similar concerns about the relationship between federal and

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Finally, BCBSM argues that, without an unabridged right to collaterally attack, the state courts are free to make a mockery of the national policies embodied in ERISA. Apart from ignoring the strong national policy embodied in the Full Faith and Credit Act, the argument proves too much. It presumes that ERISA applies even when state courts, charged with the responsibility of making the decision, determine that it does not. The same type of argument was rejected by this Court in *Caterpillar, Inc. v. Williams*, 482 U.S. at 399 n. 15.

In short, the Eleventh Circuit's decision was also proper on the ground of *res judicata*, and BCBSM's collateral attack argument provides no basis for review.

4. The Eleventh Circuit's Decision does not Demonstrate a Need for Guidance as to the Scope of ERISA's Coverage

BCBSM's assertion that the Eleventh Circuit's decision warrants review so that guidance can be given as to the scope of ERISA's coverage is wide of the mark for three reasons. First, the Eleventh Circuit's decision did

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state courts. In the context of the Anti-Injunction Act, this Court has specifically rejected the argument BCBSM now makes:

> [W]e cannot accept the argument . . . that §2283 does not apply whenever the moving party in the District Court alleges that the state court is 'wholly without jurisdiction over the subject matter, having invaded a field preempted by Congress'.

Amalgamated Clothing Workers of America v. Richman Brothers, 348 U.S. at 515 (1955).

not even deal with the scope of ERISA's coverage. The question was not whether an ERISA plan existed, but who should decide. BCBSM's complaints regarding the scope of ERISA's coverage are directed toward the Florida appellate court decision, which is not before the Court.

Second, BCBSM does not demonstrate any need for guidance concerning ERISA's coverage. The problem perceived, in its own words, is that "the State Appellate Court ignored established federal court precedent". (Petition, p. 18). The allegation that the Florida court ignored established precedent belies any need for guidance concerning the scope of ERISA coverage.

Third, BCBSM's complaints concerning the Florida appellate court decision ignore the evidence upon which it was based. In order for an employee benefit plan to exist it must be established or maintained by an employer or association of employers for the purpose of providing benefits to employees. 29 U.S.C. §1002(1),(5),(7). Otherwise stated:

> A plan . . . falls within the ambit of ERISA only if the plan . . . covers ERISA participants because of their employee status in an employment relationship, and an employer . . . is the person that establishes or maintains the plan . . . .

Donovan v. Dillingham, 688 F.2d 1367, 1371 (11th Cir. 1982).

A group insurance plan does not fall within the ambit of ERISA if it is established and maintained by "entrepreneurial businesses" as opposed to an employer or employee organization. *Donovan v. Dillingham*, 688 F.2d at 1373. This is precisely what happened here. BCBSM's

group insurance plan was established and maintained by BCBSM and AFSI, an insurance company and an insurance broker. The evidence before the Florida court showed that the plan was not established or maintained by SSDA or AFSI. While the plan purported to be an SSDA plan, this was a ruse. This kind of phenomenon, where entrepreneurs sell insurance products to small employers and claim they are ERISA plans, became so widespread that Congress was moved to note that ERISA does not apply in these situations:

> [T]hese plans are established and maintained by entrepreneurs for the purpose of marketing insurance products or services to others. They are not established or maintained by the appropriate parties to confer ERISA jurisdiction, nor is the purpose for their establishment or maintenance appropriate to meet the jurisdictional prerequisite of the act.

H.R. Rep. No. 1785, 94th Cong., 2nd Sess. 48 (1977), *cited in Wisconsin Educ. Ass'n Ins. Trust v. Iowa State Bd. of Public Instruction*, 804 F.2d 1059, 1063 (8th Cir. 1986).

At the level of Mr. Weiner's service station, an ERISA plan would exist only if he purchased BCBSM's policy for the purpose of providing benefits to his employees because of their status as such. But the evidence was that Mr. Weiner only bought insurance for members of his family, and that he did so only because they were members of his family. He did not buy insurance for his employees.

> ERISA does not regulate purchases of health insurance when there is not a welfare plan.

Donovan v. Dillingham, 688 F.2d at 1375. *Accord, Taggart Corp. v. Life & Health Benefits Administration*, 617 F.2d 1208 (5th Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981).

The Florida appellate court's decision was right on the money.

5. The Eleventh Circuit's Decision Was Also Proper on the Grounds of Abstention

The Eleventh Circuit ordered BCBSM's action for declaratory and injunctive relief dismissed on the basis of the *Rooker-Feldman* doctrine. Dismissal would also have been proper under the abstention doctrine set forth in *Younger v. Harris*, 401 U.S. 37 (1971).

BCBSM's action in the district court sought to enjoin ongoing Florida court proceedings. Specifically, it sought to enjoin the Weiners from attempting to enforce the Florida state trial court judgment and from participating in the appellate process in the Florida courts. Under this Court's decision in *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987), Florida's "vital" or "important" interest in enforcing the judgments of its courts was implicated, and *Younger* abstention was proper.

As discussed in the first section of this brief, the final element necessary to permit Younger abstention was also present. BCBSM had the ability to present the ERISA preemption question for decision in the Florida courts, and in fact did so.

Finally, the fact that BCBSM's request for an injunction was based upon a claim of federal preemption, ERISA or otherwise, did not render the district court's decision to

abstain an abuse of discretion. Federal preemption, including ERISA preemption, only militates against abstention where it is obvious. The district court here found that ERISA preemption was "a far cry from being 'readily apparent'". Thus, abstention was proper. *See, e.g., Fresh Int'l Corp. v. Agricultural Labor Relations Bd.*, 805 F.2d 1353, 1361 (9th Cir. 1986); *Marcal Paper Mills, Inc. v. Ewing*, 790 F.2d 195, 197-198 (1st Cir. 1986); *Aluminum Co. of America v. Utilities Comm'n of North Carolina*, 713 F.2d 1024, 1029-1030 (4th Cir. 1983), *cert. denied*, 465 U.S. 1052 (1984); *Bagget v. Department of Professional Regulation Bd. of Pilot Comm'rs*, 717 F.2d 521, 524 (11th Cir. 1983); *Brandenberg v. First Maryland Sav. and Loan, Inc.*, 660 F.Supp. 717, 734 (D. Md. 1987), *aff'd*, 859 F.2d 1179 (4th Cir. 1988); *Fore Way Express, Inc. v. Wisconsin Dept. of Inds., Labor and Human Relations*, 660 F.Supp. 310, 313-14 (E.D. Wis. 1987).

CONCLUSION

For the above reasons, it is respectfully submitted that BCBSM's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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September 13, 1989

FILED
OCT 5 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-250

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

BLUE CROSS AND BLUE SHIELD
OF MARYLAND, INC.,

Petitioner,

v.

ROBERT WEINER, SR., MARGARET WEINER, MARK WEINER,
AND ROBERT WEINER, SR. AS PERSONAL REPRESENTATIVE
OF THE ESTATE OF STEVEN WEINER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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TABLE OF CONTENTS

	Page
THE ELEVENTH CIRCUIT'S DECISION MISAPPLIES A DOCTRINE CENTRAL TO THE CONCEPT OF FEDERALISM AND SERIOUSLY UNDERMINES THE IMPORTANT FEDERAL POLICIES WHICH ARE THE FOUNDATION OF ERISA	2
RESPONDENTS MISCHARACTERIZE THE RECORD IN AN EFFORT TO AVOID THE CONCLUSION THAT THIS IS AN ERISA CASE	3
CONCLUSION	11

TABLE OF AUTHORITIES

Citations

	PAGE
Adam v. Joy Mfg. Co., 651 F. Supp. 1301 (D. N.H. 1987)	6
Blau v. Del Monte Corp., 748 F.2d 1348 (9th Cir. 1984), *cert. denied*, 474 U.S. 865 (1985)	6
District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983)	2
Donovan v. Dillingham, 688 F.2d 1367 (11th Cir. 1982)	5,6,9
Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58 (1987)	3
Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987)	3
Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923)	2
Scott v. Gulf Oil Corp., 754 F.2d 1499 (9th Cir. 1985)	6
Taggert Corp. v. Life and Health Benefits Administration, Inc., 617 F.2d 1208 (5th Cir. 1980)	7,8,9
Wickman v. Northwestern National Life Ins. Co., 9 E.B.C. 1482 (D. Mass. 1987)	9
Wisconsin Educ. Ass'n Trust v. Iowa State Bd. of Public Instruction, 804 F.2d 1059 (8th Cir. 1986)	10

Statutes

Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001, *et. seq.*	2,3

Regulations

29 C.F.R. § 2510.3-1(j)	5
29 C.F.R. § 2510.3-3	7

Other Authorities

Department of Labor News Release (August 6, 1979)	8,9-10

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WEINER, MARK WEINER, and
ROBERT WEINER, SR., as
Personal Representative of
the Estate of Steven Weiner,

Respondents

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Petitioner, Blue Cross and Blue Shield of Maryland, Inc. ("BCBSM"), respectfully submits this Reply in Support of its Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit in this case. (The Eleventh Circuit's Opinion is reprinted in Appendix C hereto.)

THE ELEVENTH CIRCUIT'S DECISION MISAPPLIES A DOCTRINE CENTRAL TO THE CONCEPT OF FEDERALISM AND SERIOUSLY UNDERMINES THE IMPORTANT FEDERAL POLICIES WHICH ARE THE FOUNDATION OF ERISA

In BCBSM's Petition for a Writ of Certiorari ("Petition"), BCBSM established that the Eleventh Circuit erred by invoking the *Rooker-Feldman*[1] doctrine and thereby failing to enforce the unique and extraordinary preemptive power of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et. seq.*, as announced by Congress and by this Court. It is not surprising that, in no case other than the case at bar, has any court ever applied the *Rooker-Feldman* doctrine where ERISA preemption is involved.

Respondents in their Opposition attempt to misdirect the true focus of this case. They emphasize the right of a state court to determine its own jurisdiction. (Respondents' Brief at 6-9). Of course a state court has the right to determine its own jurisidiction—but this is irrelevant to the issue in this case.

Here, the issue is the right—indeed, the obligation—of a federal court to protect important federal interests which are endangered by state court action. In such a situation, a state court's determination of its own jurisdiction does not address the problem and may even compound it.

---

[1] *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

RESPONDENTS MISCHARACTERIZE THE RECORD IN AN EFFORT TO AVOID THE CONCLUSION THAT THIS IS AN ERISA CASE

Confronted with the challenge to justify the Eleventh Circuit's circumvention of important policies as articulated by Congress and by this Court, Respondents rely, in part, upon an argument that their claims were not governed by ERISA, because the plans at issue were not ERISA plans. This is not correct, and is, in any event, a red herring; Respondents concede that the issue of whether their claims were covered by ERISA was not considered by the Eleventh Circuit (which premised its holding solely upon its view of the propriety of federal court abstention.) (Respondents' Brief at 6; *see* Eleventh Circuit Opinion (Appendix at 16 and n.2).)

BCBSM has discussed the facts and law which established that the plans at issue were ERISA plans. (*See* BCBSM's Petition at 4-6, 16-18.) We would respond herein to certain statements made by Respondents in their Opposition, lest silence be viewed as acquiescence to those contentions.

The issue of whether Respondents' claims were governed by ERISA has never been tried.[2] The only court which has considered the question of whether the plans were governed by ERISA was the Florida Fourth District Court of Appeal (the "State Appellate Court"). Following this Court's decisions in *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41 (1987) and *Metropolitan Life Insurance Co. v. Taylor*. 481 U.S. 58 (1987) (which were rendered after the decision of the State Trial Court in the case at bar), BCBSM argued before the State Appellate Court that, even upon the scanty record in the State Trial Court (which never considered the ERISA

---

[2]It is undisputed that, if the claims asserted by Respondents are ERISA claims, they do not fall within the area of ERISA in which federal and state courts have concurrent jurisdiction. (*See* 29 U.S.C. § 1132(a)(1)(b), and (e)(1) (actions by participants to clarify rights or obtain benefits to under an ERISA plan.))

issue), the Appellate Court could dismiss the action on the basis of ERISA preemption. BCBSM argued in the alternative that, in light of the sparse record on this crucial issue, a remand for a full trial upon that issue was appropriate.

Remarkably, in one paragraph of its Opinion, the State Appellate Court held that the employee benefit plans at issue were not ERISA plans. It rested its holding upon the conclusion that "[t]he evidence, *although disputed*, reflects that the plaintiff was a sole proprietor who simply purchased a group policy for his family." (Appendix at 48; emphasis added.) Thus, the State Appellate Court effectively granted summary judgment on appeal, resolving an issue which had never been tried, based upon what the Court itself characterized as "disputed" material facts. That is the sole ruling upon the issue of whether this case was governed by ERISA and was therefore within the exclusive province of the federal courts.

We respond *seratim* to several factual arguments made by Respondents.

1. Respondents contend that, after an initial endorsement, there were "no further agreements or endorsements" made to the policies. (Respondents' Opposition at 4.) In fact, the Allied Gasoline Retailers' Association of Florida ("AGRA") endorsed the Group Plan effective in 1981. It was this endorsement which allowed AGRA's members and their employees (including Respondents) to enroll in the Group Plan. (*See* Petition at 5.)

2. Respondents contend that the Group Plan was "never established or maintained by an employer or association of employers" and did not "comply with ERISA's reporting requirements." (Respondents' Opposition at 4.) In fact, the group plan was *both* established and maintained by AGRA, an association of employers—which by definition under ERISA is an "employer"—to cover the employees of its member companies. Also, the Weiner Service Station, an employer, established and maintained a plan for its employ-

ees (Robert Weiner, Sr. and Jr.) by joining AGRA, by subscribing to the group plan which covered only employees of member companies (and their dependents), by agreeing to be financially responsible for the premiums and by paying the premiums.

Respondents argue that the group plan was "established and maintained" by Association Financial Services, Inc. ("AFSI")—an "entrepreneurial business"—rather than by AGRA. It is true that AFSI, a company in the business of arranging group insurance coverage for trade associations, obtained the agreement of BCBSM to underwrite group plans endorsed by state service station dealer associations which were affiliated with the Service Station Dealers of America. But until an individual state association *endorsed* the plan and offered it to its member companies, no state plan came into existence. And until a member company subscribed to the plan and promised to pay the premiums, its employees were not covered. Thus, for ERISA purposes, the state association and the member companies "establish or maintain" the plan. (In fact, they do both.)

The Department of Labor Regulations set forth the limited situations where a group insurance program will *not* be considered an ERISA employee welfare benefit plan. *See* 29 CFR §2510.3-1(j). According to the Regulations, ERISA does not cover group insurance offered by an employer only where "*no contributions are made by an employer. . . .*;" the "*sole functions* of the employer . . . are, *without endorsing the program*, to permit the *insurer* to publicize the program to employees . . ., to collect premiums . . . [from employees] and to remit [the premiums] to the insurer;" and "the employer . . . receives no consideration in cash or otherwise in connection with the program, other than reasonable compensation, excluding any profit, for administrative services rendered in connection with payroll deductions. . . " 29 CFR §2510.3-1(j); *See Donovan v. Dillingham*, 688 F.2d 1367, 1373 n.11 (11th Cir. 1982).

It cannot reasonably be disputed that:

(a) AGRA *endorsed* the SSDA group plan.

(b) Both the Blue Cross Special Contract and the Blue Shield Special Contract provide that the *"Company* shall pay" the premiums each month for each eligible employee. Thus, the plan documents explicitly provide that the *employer not the employee* is responsible for payment of premiums.

(c) AFSI had no *direct dealings* with the employees of AGRA's member companies with respect to enrolling them in the plan—AGRA itself did. Robert Weiner's only contact was with AGRA's field representative.

(d) AGRA received a per capita administrative fee for endorsing and marketing the plan.

Finally, the group plan complied with ERISA's administrative and reporting requirements. In any event, failure to comply with these requirements does not prevent ERISA coverage of a plan if one, in fact, has been established, or evidence the lack of a plan in the first instance. *Donovan*, 688 F.2d at 1372; *Blau v. Del Monte Corp.*, 748 F.2d 1348, 1352 (9th Cir. 1984), *cert. denied*, 474 U.S. 865 (1985); *Scott v. Gulf Oil Corp.*, 754 F.2d 1499, 1503 (9th Cir. 1985); *Adam v. Joy Mfg. Co.*, 651 F. Supp. 1301, 1306 (D.N.H. 1987).

3. Respondents contend that Mr. Weiner ran a service station as a sole proprietor, that his purpose in purchasing insurance was to provide coverage for his family, and that while a son worked for him, no insurance was purchased for any other "employees." (Respondents' Opposition at 4.) However, in his deposition taken in the case, on April 25, 1986, Robert Weiner, Sr. testified that he had no other employees and that the other individuals who worked at the station were "independent contractors." (Weiner deposition at 8.)

Apparently, Mr. Weiner chose (for obvious reasons) to characterize only himself and his son as employees and to

characterize the other persons who worked at his station (one pumping gas and one fixing cars) as "independent contractors." Assuming *arguendo* that Mr. Weiner was truthful, it is obvious that Respondents' reliance on the fact that "no insurance was purchased for any other employees" to support an argument that the group plan was not an ERISA plan is specious since there were no other employees. In any event, it is undisputed that "employee status" was required for eligibility under the group plan and that the Weiner's could only be eligible because of their employee status—not because of their familial ties. (The insurance documents in this case show uniformly that coverage was limited to employees of member companies and their dependents and that coverage ended when employment ended.)

Finally, it is of no significance to argue that an association-endorsed health insurance plan covering the employees of the family business is not an ERISA plan. Many member companies of trade associations are family businesses. By participating in a group plan through the association, they can obtain insurance on more favorable terms than they could individually because of their small size. Their individual health claims are cumulated to determine the experience rating of the group and the ultimate cost of the insurance to the group. That is why ERISA defines "employer" to include a trade association, and why the Department of Labor Regulations define "employer" to include any business with at least one common law employee. (*See* 29 C.F.R. § 2510.3-3.)

4. Respondents contend that the plans at issue here were established and maintained by "entrepreneurial businesses" as opposed to an employer or employer organization, and were not, therefore, covered by ERISA. (Respondents' Opposition at 19-21.) This is simply untrue.

Respondents rely in part upon *Taggert Corp. v. Life and Health Benefits Administration, Inc.*, 617 F.2d 1208 (5th Cir.

1980) (Respondents' Opposition at 21). However, *Taggert* involved a multiple employer trust (commonly referred to as a "MET"), not an employer-association endorsed group plan. This distinction is critical. A MET is a *trust* formed solely for the purpose of selling group health insurance for employees of *unrelated* employers who do not belong to an employer association. A MET is *not* an ERISA plan—an employer association plan *is*. This has been the position of the United States Department of Labor at least since the publication of its News Release of August 6, 1979, where it said that "a multiple employer plan [ERISA plan] can be established only if the employers are *members of an organized group or association*," that "a MET arrangement is not a plan under ERISA if *unrelated* employers have merely adopted identically worded agreements that are offered by an independent third party," and that "where a MET claims to be established by an association of employers, the facts and circumstances will be examined to determine whether a *bona fide employer association* subject to the control of member employers exists." (Emphasis added).

In *Taggert*, the Fifth Circuit affirmed the holding of the District Court that the Trust at issue was not an ERISA plan. In reaching its holding, the District Court, 475 F. Supp. 124, 126 (S.D. Tex. 1979), summarized the relevant characteristics of a MET (as opposed to an ERISA plan):

> (1) The establishment of the plan by third party insurance brokers or "entrepreneurs" *acting for their own interests and not on behalf of an employer individually or as a group or association*;
>
> (2) The *lack of voice* in the management or operation of the plan *on behalf of* subscribing employers;
>
> (3) *Subscription* to the plan *by employees without the knowledge of their employers;*
>
> (4) The existence of a *profit-making enterprise* or a plan intended to be "actuarially sound."

(Emphasis added).

When an employer association group plan is involved, these characteristics do not exist since the broker establishing the plan is acting on behalf of an association, the subscribing employers have a voice through their association membership, employees cannot subscribe without the knowledge of their employer since only employers can subscribe, and the basic motivation for the plan is not profit-making but to provide a service to the employer members of the association.

In *Donovan v. Dillingham*, 688 F.2d 1367 (11th Cir. 1982) (Respondents' Opposition at 19), the Eleventh Circuit in a unanimous en banc decision, thoroughly reviewed the issue of ERISA benefit plans and discussed the *Taggert* case at length. Although the Eleventh Circuit agreed with the Fifth Circuit's decision that the Taggert plan was not an ERISA plan, it also held, contrary to the apparent holding in *Taggert*, that an employer purchasing group health insurance for its employees, even through a MET, *can* establish an ERISA plan.[3]

The Eleventh Circuit's reading of *Taggert* was subsequently adopted by the United States District Court for the District of Massachusetts in *Wickman v. Northwestern National Life Ins. Co.*, 9 EBC 1482 (D. Mass. 1987).

The Department of Labor News Release, referred to above, also states that even in a MET situation, each employer subscribing to the MET creates its own ERISA plan:

> In the department's view, a MET arrangement is not a plan under ERISA if unrelated employers have merely adopted identically worded agreements that are offered by an independent third party as a means to fund plan benefits. In this situation, *each employer has its own plan* and the organization which provides benefits under con-

[3]Since the present case does not involve a MET but a trade association group plan, it is even clearer here that the Weiner Station plan was an ERISA plan.

> tract with the employer is not itself an employee benefit plan but is instead the provider of a funding arrangement for the *various plans*. (Emphasis added).

Respondents also rely on *Wisconsin Educ. Ass'n Trust v. Iowa State Bd. of Public Instruction*, 804 F.2d 1059 (8th Cir. 1986) (Respondents' Opposition at 20), in which the issue was whether an insurance trust established by several unions was an ERISA employee welfare benefit plan. The Eighth Circuit held that the trust was not an ERISA plan because 30% of the individuals receiving benefits were not union members and ERISA requires participants of a union plan to be union members. In the present case, it is undisputed that eligibility was limited to employees of companies which were AGRA members, thus making the *Wisconsin Education* case inapposite.

In summary, the undisputed facts show that under ERISA, the Department of Labor ERISA Regulations, the Department of Labor News Release, and judicial decisions, both the AGRA plan and the Weiner Station plan were ERISA benefit plans as a matter of law: the AGRA plan at the association level, and the station plan at the individual employer level.

CONCLUSION

In its Opinion, the Eleventh Circuit has ignored the unique and extraordinary preemptive power of ERISA, as announced by Congress and this Court. The *Rooker-Feldman* doctrine is simply inapplicable to this case. Its enlargement by the Eleventh Circuit threatens the vital federal interests at stake.

For all of the foregoing reasons, BCBSM respectfully requests that this Court issue a Write of Certiorari to review the decision rendered in the captioned-matter by the United States Court of Appeals for the Eleventh Circuit.

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